DEPARTMENT OF HOMELAND SECURITY **4910-62-P**

Transportation Security Administration

49 CFR Parts 1570 and 1572

[Docket No. TSA-2003-14610; Amendment No. 1572-1]

RIN 1652-AA17

Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License

AGENCY: Transportation Security Administration (TSA), Department of Homeland Security (DHS).

ACTION: Interim final rule; request for comments.

SUMMARY: The Transportation Security Administration (TSA) is amending the Transportation Security Regulations to establish security threat assessment standards for determining whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a commercial drivers license (CDL). TSA is also establishing procedures for seeking a waiver from the standards and for appealing a security assessment determination.

TSA is issuing this interim final rule in coordination with a separate interim final rule being issued by the Federal Motor Carrier Safety Administration (FMCSA). The FMCSA rule amends the Federal Motor Carrier Safety Regulations governing commercial drivers licenses to prohibit States from issuing, renewing, transferring, or upgrading a commercial drivers license with a hazardous material endorsement unless the Department of Justice has first conducted a background records check of the applicant and the TSA has determined that the applicant does not pose a security threat warranting denial of the hazardous materials endorsement. These interim final rules implement the

background records check requirements of section 1012 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), and also establish requirements regarding the transportation of explosives in commerce.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]. Comments must be received on or before **[**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.].

ADDRESSES: Comments Submitted by Mail: Address written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW, Washington, DC 20590-0001. You must identify the docket number TSA-2003-14610 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that TSA received your comments, include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. TSA-2003-14610." The postcard will be date-stamped and mailed to you.

Comments Filed Electronically: You may also submit comments through the Internet at http://dms.dot.gov.

Reviewing Comments in the Docket: You may review the public docket containing comments on this proposed rule in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: For technical issues, Stephen Sprague, Office of Maritime and Land, Transportation Security Administration Headquarters, West Building, Floor 9, 400 Seventh Street, SW, Washington, DC 20590; e-mail: patriotact@tsa.dot.gov; telephone: 571-227-1500.

For legal issues, Dion Casey, Office of Chief Counsel, Transportation Security Administration Headquarters, West Building, Floor 8, TSA-2, 400 Seventh Street, SW, Washington, DC 20590; e-mail: Dion.Casey@tsa.dot.gov; telephone: 571-227-2663.

SUPPLEMENTARY INFORMATION:

Comments Invited

This interim final rule is being adopted without prior notice and prior public comment. However, interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. Comments must include the regulatory docket or amendment number and must be submitted in duplicate to the address above. All comments received, as well as a report summarizing each substantive public contact with TSA personnel on this rulemaking, will be filed in the public docket. The docket is available for public inspection before and after the comment closing date.

TSA will consider all comments received on or before the closing date for comments. Comments filed after the closing date will be considered to the extent practicable.

See "ADDRESSES" above for information on how to submit comments.

Availability of Rulemaking Document

You can get an electronic copy of this final rule using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) Web page (http://dms.dot.gov/search).

(2) On the search page type in the last digits of the docket number shown at the beginning of this document. Click on "search."

(3) On the next page, which contains the docket summary information for the docket you selected, click on the final rule.

You also may get an electronic copy by accessing the Government Printing Office's web page at http://www.access.gpo.gov/su_docs/aces/aces140.html or the TSA Laws and Regulations web page at http://www.tsa.dot.gov/public/index.jsp, or by writing or calling the individuals listed in the FOR FURTHER INFORMATION CONTACT section. You must identify the docket number of this rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this rulemaking document may contact the persons listed in "For Further Information Contact" for information**.** You can get further information regarding SBREFA on the Small Business Administration's web page at http://www.sba.gov/advo/laws/law_lib.html.

Abbreviations and Terms Used in This Document

ATSA—Aviation and Transportation Security Act

ATF – Bureau of Alcohol, Tobacco, Firearms, and Explosives

CDC—Centers for Disease Control and Prevention

CDL—Commercial drivers license

DHS—Department of Homeland Security

DOJ—Department of Justice

DOT—Department of Transportation

FMCSA—Federal Motor Carrier Safety Administration

HSA—Homeland Security Act

HMR—Hazardous Material Regulations

MTSA—Maritime Transportation Security Act

RSPA—Research and Special Programs Administration

SEA— Safe Explosives Act

TSA—Transportation Security Administration

USA PATRIOT Act— Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

Background

On September 11, 2001, several terrorist attacks were made against the United States. Those attacks resulted in catastrophic human casualties and property damage. In response to those attacks, Congress passed the Aviation and Transportation Security Act (ATSA), which established the Transportation Security Administration (TSA).[1] TSA was created as an agency within the Department of Transportation (DOT), operating under the direction of the Under Secretary of Transportation for Security. As of March 1, 2003, TSA became an agency of the Department of Homeland Security (DHS), and the Under Secretary is now the Administrator. TSA continues to possess the statutory authority that

[1] Pub. L. 107-71, November 19, 2001, 115 Stat. 597.

ATSA established. ATSA granted to the Administrator responsibility for security in all modes of transportation.[2]

As part of its security mission, TSA is responsible for assessing intelligence and other information in order to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats.[3] The Administrator has an express mandate to identify and coordinate countermeasures to address threats to the transportation system, including the authority to receive, assess, and distribute intelligence information related to transportation security. TSA is charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities.[4]

This authority includes conducting background checks on individuals in the transportation industries. The background checks may include collecting fingerprints to determine if an individual has a criminal conviction or the use of a name and other identifying characteristics to determine whether an individual has committed international or immigration offenses. In aviation, TSA has statutory authority to conduct background checks on individuals with unescorted access to secured areas of aircraft and airports.[5] TSA has implemented this authority through a series of regulations that require fingerprint-based criminal history records checks (CHRC) for flightcrew members, individuals with access to secured areas of airports and aircraft, screeners, and

[2] 49 U.S.C. 114(d).
[3] 49 U.S.C. 114(f)(1)-(5), (h)(1)-(4).
[4] 49 U.S.C. 114(f)(1) and (5).
[5] 49 U.S.C. 44936.

supervisors. If the individual has committed a disqualifying criminal offense within a prescribed time period, the individual is denied unescorted access to secured areas.[6]

The Administrator is uniquely situated as an expert in transportation security, based on his functions, duties, and powers, to determine whether sufficient cause exists to believe that an individual poses a threat to transportation security.

USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act was enacted on October 25, 2001.[7] Section 1012 of the USA PATRIOT Act amended 49 U.S.C. Chapter 51 by adding a new section 5103a titled "Limitation on issuance of hazmat licenses." Section 5103a(a)(1) provides:

> A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Transportation has first determined, upon receipt of a notification under subsection (c)(1)(B), that the individual does not pose a security risk warranting denial of the license.[8]

Section 5103a(a)(2) subjects license renewals to the same requirements.

FMCSA advised TSA that there is no "hazmat license" per se under State or Federal law, and that the "hazmat license" referred to in section 1012 of the USA PATRIOT Act is the hazardous materials endorsement to a commercial drivers license (CDL), which is required by 49 CFR 383.93(b)(4). Section 1012(b) of the Act amended 49 U.S.C. 31305(a)(5), which prescribes fitness and testing standards for individuals operating a commercial motor vehicle carrying a hazardous material, by adding a new

[6] 49 CFR parts 1542 and 1544.
[7] Pub. L. 107-56, October 25, 2001, 115 Stat. 272.
[8] The Secretary of Transportation delegated the authority to carry out the provisions of this section to the Under Secretary of Transportation for Security/Administrator. 68 FR 10988, March 7, 2003.

paragraph that requires an individual to undergo a background records check before the State issues a CDL to that individual. To qualify for the hazardous materials endorsement, an individual must first pass a specialized knowledge test (49 CFR 383.121) in addition to the requisite general knowledge and skills tests required for a CDL.

Section 5103a(c) requires the Attorney General, upon the request of a State in connection with issuance of a hazardous materials endorsement, to carry out a background records check of the individual applying for the endorsement and, upon completing the check, to notify the Secretary (as delegated to the Administrator of TSA) of the results. The Secretary then determines whether the individual poses a security risk warranting denial of the endorsement. The background records check must consist of: (1) a check of the relevant criminal history databases; (2) in the case of an alien, a check of the relevant databases to determine the status of the alien under U.S. immigration laws; and (3) as appropriate, a check of the relevant international databases through Interpol-U.S. National Central Bureau or other appropriate means.

Maritime Transportation Security Act

Congress enacted the Maritime Transportation Security Act (MTSA) on November 25, 2002.[9] Section 102 of MTSA requires the Secretary[10] to conduct background records checks for individuals with access to a secure area of a vessel or facility. It also requires the Secretary to establish procedures for processing appeals and applications for a waiver to security threat assessment standards.

[9] Pub. L. 107-295, November 25, 2002, 116 Stat. 2064.
[10] "Secretary" is defined as the Secretary of the department in which the Coast Guard is operating. Effective March 1, 2003, the Coast Guard was transferred to the Department of Homeland Security under the Homeland Security Act.

TSA is including this discussion of the MTSA requirements because the agency plans to harmonize, to the extent possible, all of the various background checks that are required by statute, and so elements of MTSA appear in this rule. For instance, this rule requires a review of records for the preceding seven years in order to determine whether a conviction of a disqualifying criminal offense has occurred. This seven-year period is required by MTSA and is appropriate for use in the context of this rule.

Safe Explosives Act

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002.[11] Sections 1121-1123 of the SEA amended section 842(i) of Title 18 of the U.S. Code by adding several categories to the list of persons who may not lawfully "ship or transport any explosive in or affecting interstate or foreign commerce" or "receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce." Prior to the amendment, 18 U.S.C. 842(i) prohibited the transportation of explosives by any person under indictment for or convicted of a felony, a fugitive from justice, an unlawful user or addict of any controlled substance, and any person who had been adjudicated as a mental defective or committed to a mental institution. The amendment added three new categories to the list of prohibited persons: aliens (with certain limited exceptions), persons dishonorably discharged from the armed forces, and former U.S. citizens who have renounced their citizenship. Individuals who violate 18 U.S.C. 842(i) are subject to criminal prosecution.[12] These incidents are investigated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) of the Department of Justice and referred, as appropriate, to the United States Attorneys.

[11] Pub. L. 107-296, November 25, 2002, 116 Stat. 2280.
[12] The penalty for violation of 18 U.S.C. 842(i) is up to ten years imprisonment and a fine of up to $250,000.

However, 18 U.S.C. 845(a)(1) provides an exception to section 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertains to safety." Under this exception, if DOT regulations address the transportation security issues of persons engaged in a particular aspect of the safe transportation of explosive materials, then those persons are not subject to prosecution under 18 U.S.C. 842(i) while they are engaged in the transportation of explosives in commerce. For example, the regulations set forth in this rule disqualify persons convicted of certain felonies from obtaining a CDL with a hazardous materials endorsement. Because the regulations address a particular aspect of the safe transportation of explosives materials, i.e., the threat to public safety posed by felons transporting hazardous materials, the exception contained in 18 U.S.C. 845(a)(1) applies, and felons transporting explosives in commerce would not be subject to criminal prosecution under section 842(i).

In addition, if DOT determines that certain aspects of the transportation of explosives do not pose a security threat and therefore do not warrant regulations, the exception contained in 18 U.S.C. 845(a)(1) also applies, and persons engaged in such transportation would not be subject to criminal prosecution under section 842(i). As discussed in greater detail throughout this document, this rule addresses all of the categories of individuals who are prohibited from transporting explosives via commercial motor carrier under the SEA, and thus 18 U.S.C. 845(a)(1) excepts those categories of individuals from prosecution under section 842(i) for activities occurring during and incident to the transportation of explosives in commerce.

On February 6, 2003, TSA issued a regulation, effective immediately, establishing temporary requirements for all Canadian motor carriers and rail carriers using non-resident aliens to transport explosives into the U.S.[13] In essence, the rule prohibits a Canadian commercial transporter of explosives from entering the U.S. unless he or she is identified as a known carrier. A transporter is considered a known carrier by submitting specified information to Transport Canada, an agency within the Canadian government that oversees transportation safety and security. Transport Canada conducts checks to ensure that the transporter is a legitimate entity authorized to do business in Canada, and that there are no security concerns with the transporter. Transport Canada forwards this information to TSA, which then conducts additional security checks and forwards the list of acceptable transporters to the U.S. Customs Service, which conducts checks at the U.S.-Canada border.

This rule triggers the exception in 18 U.S.C. 845(a)(1) for aliens entering the United States from Canada who are transporting, shipping, receiving, and possessing explosives incident to and in connection with the commercial transportation of explosives by rail, motor carrier, or water. Thus, such aliens will not violate 18 U.S.C. 842(i)(5) during such commercial transportation.

This rulemaking document includes this discussion of the SEA requirements because explosives are among the categories of substances that are defined as "hazardous materials" under FMCSA regulations at 49 CFR 383.5.[14] This rule is specifically crafted to invoke the section 845(a)(1) exception with respect to domestic transporters of explosives in the trucking industry. A companion rule, to be issued by FMCSA, will

[13] 68 FR 6083, February 6, 2003, Docket No. TSA-2003-14421.
[14] See also, 49 CFR 173.50, which is the definition of explosives, promulgated by Research and Special Programs Administration.

prohibit the issuance of a hazardous materials endorsement to an individual unless the individual has complied with TSA's security threat assessment regulations.

This rule prohibits an individual from holding a CDL with a hazardous materials endorsement if he or she (1) is an alien (unless he or she is a lawful permanent resident) or a U.S. citizen who has renounced his or her U.S. citizenship; (2) is wanted or under indictment for certain felonies; (3) has a conviction in civilian or military court for certain felonies; (4) has been adjudicated as a mental defective or committed to a mental institution; or (5) is considered to pose a security threat based on a review of various databases. In addition, FMCSA's existing CDL regulations prohibit individuals with a CDL from operating a commercial motor vehicle if he or she tests positive for a controlled substance, or has adulterated or substituted a test specimen for controlled substances.[15] Thus, TSA and FMCSA rules cover individuals convicted of serious felonies, aliens,[16] individuals under felony indictment, fugitives from justice, individuals adjudicated as mental defectives or committed to a mental institution, individuals who have renounced their U.S. citizenship, and unlawful users or addicts of any controlled substance.

TSA has also addressed the security risk that individuals who have been dishonorably discharged from the armed services pose. Under the Uniform Code of Military Justice, a person may only be dishonorably discharged if convicted of certain crimes. All crimes that may result in a dishonorable discharge do not give rise to a

[15] 49 CFR 382.215.

[16] TSA notes that the SEA does not prohibit lawful permanent residents and other narrow categories of aliens from transporting explosives. (18 U.S.C. 842(i)(5)). However, FMCSA's CDL regulations require a CDL holder to have a "State of domicile," which is defined as "that State where a person has his/her true, fixed, and permanent home and principal residence and to which he/she has the intention of returning whenever he/she is absent." (49 CFR 383.5). Lawful permanent residents of the U.S. are the only aliens who have a State of domicile under this definition. Thus, they are the only aliens who are permitted to have a CDL.

security threat. Under articles 133 and 134 of the Uniform Code of Military Justice, an individual may be dishonorably discharged for "conduct unbecoming an officer" and "disorders and neglects to the prejudice of good order and discipline." These violations may include bigamy, fraternization, and drunk and disorderly conduct. TSA believes that in most cases, these actions would not affect an individual's ability to safely and securely transport explosives and hazardous materials. TSA does not believe it is advisable to penalize former members of the military for actions that would not necessarily impact a civilian CDL holder's ability to obtain or keep a hazardous materials endorsement. Also, it is important to note that an individual may be convicted of a serious felony and not be dishonorably discharged from military service. For these reasons, TSA has concluded that a careful analysis of the facts underlying a dishonorable discharge is necessary before concluding that an individual should be disqualified for reasons of transportation security. Therefore, TSA will review the underlying records to determine what action gave rise to a dishonorable discharge and take appropriate action. TSA will issue a notice of threat assessment for any individual convicted of a serious felony, at least those already included in the rule as a disqualifying criminal offense. For others, TSA will assess whether the underlying activity bears on an individual's ability to perform CDL responsibilities.

Finally, TSA is using a definition of hazardous materials that includes explosives, which is based on DOT's definition, as required by the USA PATRIOT Act.[17] A detailed

[17] Paragraph (b) of Section 1012 describes hazardous materials as any material defined as a hazardous material by the Secretary of Transportation and any chemical or biological material or agency determined by the Secretary of Health and Human Services or the Attorney General as being a threat to the national security of the U.S.

discussion of the manner in which explosives and hazardous materials are regulated by DOT and ATF is necessary to understand the scope and rationale of this rule.

The hazardous material regulations (HMR) are issued by the Research and Special Programs Administration (RSPA), an agency within DOT. Under the HMR, which are based on the internationally recognized United Nations (UN) system for classification, identification, and ranking of hazardous materials, all hazardous materials are divided into nine general classes according to their physical, chemical, and nuclear properties as follows:

Class 1	Explosives
Class 2	Compressed, flammable, nonflammable, and poison gases
Class 3	Flammable liquids
Class 4	Flammable solids
Class 5	Oxidizers and organic peroxides
Class 6	Toxic and infectious materials
Class 7	Radioactive materials
Class 8	Corrosive materials
Class 9	Miscellaneous dangerous substances and articles

Within Classes 1, 2, 4, 5, and 6, there are more specifically defined divisions, and within Class 1 there are Compatibility Group subdivisions, as well. The hazard classes and divisions are not mutually exclusive. Certain hazardous materials have multiple dangerous properties, each of which must be addressed according to its relative potential to do harm. In these cases, the UN system and the HMR allow identification and communication of both the primary and subsidiary threats.

The HMR define a Class 1 material as any substance or article that is designed to function by explosion – that is, an extremely rapid release of gas or heat – or one that, by chemical reaction within itself, functions in a similar manner even if not designed to do so. Class 1 materials are divided into six divisions. Assignment of an explosive to a

division depends on the degree and nature of the explosive hazard presented. Thus, a Division 1.1 explosive is one that presents a mass explosive hazard. A mass explosion is one that affects almost the entire load simultaneously. A Division 1.2 explosive has a projection hazard, which means that if the material explodes, it will project fragments outward at some distance. A Division 1.3 explosive presents a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard. A Division 1.4 explosive has a minor explosion hazard that is largely confined to the package and does not involve projection of fragments. A Division 1.5 explosive is a very insensitive explosive that has a mass explosion potential, but is so insensitive that it is unlikely to detonate under normal conditions of transport. A Division 1.6 explosive is an extremely insensitive article that does not have a mass explosion hazard and demonstrates a negligible probability of accidental initiation or propagation. Specific materials that are covered by the definition of Class 1 materials include such items as blasting agents, propellants, detonators, various types of ammunition, explosives charges and projectiles, ammonium nitrate-fuel oil mixtures, rockets, fireworks, and warheads.

For explosives transportation, the HMR prohibit transportation of an explosive unless it has been tested, classed, and approved by the Associate Administrator for Hazardous Materials Safety, RSPA. The approval granted by the Associate Administrator specifies packaging and other transportation provisions that must be followed by the person who ships or transports the explosive material. In addition to packaging requirements, the HMR require explosives to be labeled and/or placarded to indicate the explosive hazard. Explosives shipments generally must be accompanied by shipping papers and emergency response information.

The HMR definition for a Class 1 material is test-and performance-based and, thus, accommodates newly developed materials and modifications to existing materials. Moreover, the HMR definition for a Class 1 material is consistent with definitions used and accepted internationally (i.e., the UN Recommendations for the Transport of Dangerous Goods, the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air, and the International Maritime Organization International Maritime Dangerous Goods Code), not only for transportation, but for many other applications, as well.

For the most part, the HMR definition of an explosive is consistent with the relevant definition established by the ATF. By statute, ATF regulates materials that are explosives, blasting agents, and detonators. An "explosive" is "any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; the term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters;" a "blasting agent" is, in part, "any material or mixture, consisting of fuel and oxidizer, intended for blasting, not otherwise defined as an explosive;" and a "detonator" is "any device containing a detonating charge that is used for initiating detonation in an explosive; the term includes, but is not limited to, electric blasting caps of instantaneous and delay types, blasting caps for use with safety fuses and detonating-cord delay connectors." ATF supplements these statutory definitions with a list of specific materials, updated periodically, that are regulated as explosives. 18 U.S.C. 841(c)-(f). Certain statutory exemptions may apply. For example, certain types and quantities of black powder may be exempt from ATF regulation. 18 U.S.C. 845(a)(5).

Because the various definitions used by DOT and ATF are not identical, some materials are treated differently by the two agencies. For example, ATF lists several specific materials that it regulates as explosives that DOT regulates as a different class of hazardous materials. Further, ATF regulates all mixtures that contain any of the materials it lists as explosives. ATF does not define a lower limit at which a mixture would cease to meet the definition for an explosive. The DOT definition, by contrast, depends on test results of materials packaged for shipment to determine whether a material should be classed as an explosive under the HMR. Thus, if a mixture is tested and does not exhibit explosive properties, it would not be classed as an explosive under the HMR, even though the mixture might contain a material that, by itself, would be classed as an explosive.

Moreover, the ATF explosives list includes dinitrophenol, guncotton, nitrostarch, sodium picramate, and several other materials that DOT regulates as a different class of hazardous materials when combined with water. When combined with water, these materials may not exhibit explosive properties and, thus, do not meet the DOT definition for an explosive. DOT regulates these materials, with specified percentages of water, as Division 4.1 (flammable solid) materials.

ATF regulates ammonium nitrate-fuel oil mixtures and ammonium nitrate explosive mixtures as explosive materials. Under the HMR, ammonium nitrate is classed as a Division 1.1 explosive, and ammonium nitrate-fuel oil mixtures are classed as Division 1.5 explosives. However, some mixtures that include ammonium nitrate among their components are classed as Division 5.1 (solid oxidizer) materials because they require further processing before they can be used to produce a practical explosion.

Again, the difference exists because the DOT classification criteria depend on testing to determine whether a material exhibits explosive properties; if a material is tested and found not to meet the DOT definition, it is not regulated as an explosive for purposes of the HMR.

A major difference between the ATF and DOT requirements for regulating explosives is how the agencies treat military and government shipments. In accordance with 18 U.S.C. 845, ATF generally does not regulate explosives being delivered to any agency of the United States or any state or political subdivision thereof; or explosives manufactured under the regulation of the military department of the United States or transported on behalf of the military department of the United States or transported to arsenals, navy yards, depots, or other establishments owned by, or operated on behalf of, the United States. Under the HMR, by contrast, government and military shipments of explosives are regulated if such shipments are transported by commercial carriers rather than government or military personnel.

For purposes of SEA, DOT compared the list of materials that ATF regulates as explosives with the definitions for different classes of hazardous materials regulated under the HMR and assessed the security risks associated with the transportation of such materials. DOT concluded that a mixture that does not meet the definition of a Class 1 material under the HMR generally does not pose a sufficient security risk when transported in commerce to warrant detailed employee background checks at this time. Such mixtures may meet the definition of a different hazardous class, in which case they are subject to applicable security requirements in the regulations of RSPA, FMCSA, or

USCG regulations, or they may not meet the definition of any hazard class, in which case they are not regulated as hazardous materials under the HMR.

DOT further concluded that a material regulated as an explosive by ATF but as a different class of hazardous material under the HMR, such as certain wetted materials and ammonium nitrate mixtures, generally will be subject to applicable security requirements in HM-232 (which is the final rule issued by RSPA on March 25, 2003 at 65 FR 14510) or in TSA, FMCSA, or USCG regulations, as incorporated into the hazardous materials regulations in the RSPA rule that accompanies this rule. If required to be placarded, shipments of such materials will be subject to the background check requirements mandated in this rule when transported by motor carrier and to the security plan requirements in HM-232. When shipped in amounts that do not require placarding, such shipments do not pose a security threat when transported in commerce sufficient to warrant detailed employee background check requirements at this time.

Generally, DOT determined that the placarding thresholds established in the HMR for explosives shipments represent explosives that pose the most significant security threat when transported in commerce. Explosives in the following quantities must be placarded in accordance with HMR requirements:

(1) Any quantity of Division 1.1, 1.2, or 1.3 explosives;

(2) More than 454 kg of Division 1.4, 1.5, or 1.6 explosives.

Examples of Division 1.4 explosives include toy caps, signal devices, flares, and distress signals. In quantities less than 454 kg, such explosives generally do not present a significant security threat involving their use during transportation for a criminal or

terrorist act. Similarly, Division 1.5 and 1.6 explosives are sufficiently insensitive that, in amounts below 454 kg, they generally do not present a significant security threat.

Although there are differences between the ATF and DOT definition of explosives, TSA and DOT believe that any gaps between the definitions which cover either the type of explosive or the amount of explosive in transportation do not give rise to security concerns that warrant additional regulation at this time. The security and safety regimes established in this rule and the FMCSA and RSPA regulatory programs address the transportation of explosives by persons posing a security threat.

It is important to note, however, that TSA continues to analyze explosive, radioactive, organic, flammable, and corrosive materials, and medical and hazardous wastes in transportation to determine whether additional security procedures are necessary to protect the public, infrastructure and the transportation system. TSA anticipates that, after the completion of risk analyses, additional regulations will evolve that are narrowly tailored to address specific products, processes, and threat information, regardless of whether they must be placarded in transportation. In addition, TSA is considering whether a larger group of individuals should be required to undergo fingerprint-based criminal history background checks and whether a different security check would effectively capture the individuals who are bent on using the transportation network to commit terrorist acts.

Based on the foregoing, the TSA, FMCSA, and RSPA rules now regulate the security threat posed by the transportation of explosives by commercial motor vehicle incident to and in connection with the commercial transportation of explosives, and

therefore the prohibitions of 18 U.S.C. 842(i) do not apply to persons while they are engaged in such transportation.

Summary of the Interim Final Rule

This interim final rule implements section 1012 of the USA PATRIOT Act. The rule establishes security threat assessment standards for determining whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a CDL. TSA will determine that an individual poses a security threat if he or she: (1) is an alien (unless he or she is a lawful permanent resident) or a U.S. citizen who has renounced his or her U.S. citizenship; (2) is wanted or under indictment for certain felonies; (3) has a conviction in military or civilian court for certain felonies; (4) has been adjudicated as a mental defective or committed to a mental institution; or (5) is considered to pose a security threat based on a review of pertinent databases. The rule establishes conditions under which an individual who has been determined to be a security risk may appeal the determination, and procedures TSA will follow when considering an appeal. The rule also provides a waiver process for those individuals who otherwise cannot obtain a hazardous materials endorsement because they have a conviction for a disqualifying felony, or were adjudicated as a mental defective or committed to a mental institution.

The primary basis for determining whether an individual has committed a disqualifying criminal offense is collecting fingerprints and submitting them to the Federal Bureau of Investigation (FBI) for a criminal history records check. The process of collecting, submitting, and analyzing fingerprints is resource intensive and complex. Under this rule, TSA and the States will consult closely to determine the most efficient

and cost-effective means of collecting fingerprints without unduly burdening State resources. TSA must balance the critical need to evaluate and ensure the security of hazardous materials in transportation with the practical need to develop an effective, efficient infrastructure that will support security threat assessments, including collection and analysis of fingerprints, of approximately 3.5 million commercial truck drivers in a very short time period.

TSA will work closely with the Department of Justice (DOJ), the States, and the industry to develop an effective, efficient fingerprinting process. Generally, TSA will provide guidance on where individuals will report to submit fingerprints. This may include local law enforcement offices, State motor vehicle offices, or private collection companies that have been certified to capture fingerprints. The fee for submitting fingerprints to the FBI for a criminal history records check will be collected when the prints are captured and then forwarded to the FBI. The FBI will send the fingerprint submission results to TSA, and TSA will notify the appropriate State if the background records check does not reveal a disqualifying offense. However, if the search discloses an adverse report, TSA will investigate it to determine if the record accurately corresponds to the applicant, if an arrest subsequently resulted in a conviction, or any other problems the criminal record reveals. TSA will notify the individual and/or the State of the final outcome once this investigation is complete.

For purposes of this rule, TSA provides cost estimates based on the fees that are known (such as the fee the FBI charges to process each set of fingerprints) and our experience with background records checks in the aviation sector. However, there may be challenges to completing this process within the cost estimates provided due to

differences in State records, the degree to which a State has electronic records, and the difficulties of locating individual CDL holders. Therefore, the costs set out in the rule are subject to change, but most likely will diminish over time.

In developing these regulations, TSA has and will continue to coordinate with the National Crime Prevention and Privacy Compact Council (Compact Council). The Compact Council was established pursuant to the 1998 National Crime Prevention and Privacy Compact (Compact) (42 U.S.C. 14616). The Compact establishes legal criteria governing criminal history record checks for non-criminal justice purposes.

The Compact Council is composed of 15 members, appointed by the Attorney General, and has the authority to promulgate rules and procedures governing the use of the Federal-State criminal history records system for noncriminal justice purposes. The Council's oversight seeks to ensure uniform application of the statutory requirements, while permitting each State to develop its own dissemination policy within its borders. As a general rule, the Compact requires the submission of fingerprints for purposes of gaining access to the criminal history databases for noncriminal justice purposes. Due to the time it will take to develop a fingerprint collection infrastructure for 3.5 million hazardous materials endorsement holders, the Compact Council has agreed that TSA may obtain criminal history information based on names and other biographical data, so long as fingerprints are subsequently gathered and submitted. TSA will report to the Council periodically to ensure compliance with the Compact.

To ensure the development of an effective infrastructure for conducting security threat assessments, TSA solicits comments and ideas from the States, trucking industry associations, labor organizations, and other interested parties. TSA must use a system

that is flexible enough to accommodate all of the unique characteristics of the State processes, and the mobile nature of the workforce, and that is cost-effective for the drivers, employers, and governmental agencies.

The background check process for individuals applying for or holding hazardous materials endorsements will proceed as follows:

- As of 120 days following publication of the rule, any CDL holder who does not meet the security threat assessment standards prescribed in this rule is not authorized to hold or obtain a hazardous materials endorsement.
- Following publication of the rule, TSA will begin to conduct security threat assessments on individuals who currently hold hazardous materials endorsements, as well as drivers applying for new or transfer endorsements. This assessment will make use of names and biographical data contained in the Commercial Drivers License Information System (CDLIS). Some assessments will include entering names in the National Crime Information Center (NCIC) database, the Interstate Identification Index (III), and other databases, such as terrorism watch lists. If the name and biographical data search discloses that an individual does not meet the security threat assessment standards, TSA will notify the individual and the State in which he or she holds or is applying for a hazardous materials endorsements. If the individual wishes to dispute the results of the search, he or she will submit fingerprints or court records, in a manner prescribed by TSA, to verify or invalidate the individual's identity and criminal background, and the results of the search. If the individual does not contest the initial result or is not able to

correct the record, TSA will notify the State to revoke or deny the endorsement.

- If the name-based background check discloses that a driver is the subject of an outstanding felony want or warrant, TSA will ensure that the appropriate law enforcement agency is notified.
- Individuals whose name-based check indicates that they meet the security threat assessment standards must submit fingerprints between 180 days and five years from the effective date of the rule, when applying for a new, renewed, or transferred hazardous materials endorsement. A State may require fingerprint submission prior to the expiration of five years, or on a more frequent basis than once every five years.
- Existing hazardous materials endorsement holders may be subject to fingerprint-based checks prior to renewal of their endorsements in a manner prescribed by TSA.
- After 180 days following the effective date of the rule, no State may issue, renew, or transfer a hazardous materials endorsement unless TSA has notified the State that the individual holding or applying for the endorsement does not pose a security threat.

Each State must notify individuals holding a hazardous materials endorsement that he or she will be subject to a security threat assessment, at least 180 days before the endorsement expires. The notice must also inform these individuals that they may initiate the security threat assessment required by this rule at any time after receiving the notice, but no later than 90 days before the expiration date of the endorsement. For the first 180

days the State requirements of this rule are in effect, a State may extend the expiration date of a hazardous materials endorsement, until TSA has notified the State that an individual does or does not pose a security threat. TSA requests comments from the States and industry on the process outlined above. TSA understands that each State has a unique registration system in place, and that there may be significant challenges to collecting fingerprints of all CDL drivers with hazardous materials endorsements. TSA will continue to work closely with all affected entities to develop an efficient and effective system.

Section-By-Section Analysis

Part 1570 – Land Transportation Security: General Rules

Section 1570.1 Scope.

This part applies to any person engaged in activities subject to the requirements of this part.

Section 1570.3 Fraud and intentional falsification of records.

This section prohibits persons from making, or causing to be made any fraudulent or intentionally false statement in any record or report that is kept, made, or used to show compliance with this subchapter, or exercise any privileges under this subchapter. Also, this section prohibits any reproduction or alteration, for fraudulent purpose, of any record, report, security program, access media, or identification media issued under this subchapter or pursuant to standards in this subchapter.

TSA is adding these prohibitions to prevent persons from providing false information on the application for any authorization for which TSA conducts a security threat assessment, including a hazardous materials endorsement for a CDL. This section

is consistent with the prohibition on fraud and intentional falsification in aviation security.[18]

Part 1572 – Credentialing and Background Checks for Land Transportation Security

Subpart A – Requirements to Undergo Security Threat Assessments.

Section 1572.3 Terms used in this part.

This section provides definitions for several terms used in Part 1572. These definitions are relevant only to requirements in this part.

"Alien" means a person not a citizen of the U.S. This definition is consistent with the definition of that term provided in the USA PATRIOT Act, which defines "alien" by referring to the definition given that term in section 101(a)(3) of the Immigration and Nationality Act (INA). Section 101(a)(3) of the INA defines "alien" as any person not a citizen or national of the U.S.[19]

"Alien registration number" means the number issued by the DHS to an individual when he or she becomes a lawful permanent resident.

The terms "commercial drivers license," "endorsement," and "hazardous materials" are used as defined in FMCSA's regulations at 49 CFR 383.5

A "hazardous material" is defined in FMCSA's rule as any material that: (1) in accordance with Federal hazardous materials transportation law (49 U.S.C. 5101 et seq.), has been determined to pose an unreasonable risk to health, safety, and property when transported in commerce and that is required to be placarded under subpart F of part 172

[18] 49 CFR 1540.103.
[19] 8 U.S.C. 1101(a). Nationals may not obtain a hazardous materials endorsement under FMCSA rules.

of the Hazardous Materials Regulations (49 CFR parts 171-180); or (2) any quantity of any material listed as a select agent or toxin by CDC in 42 CFR part 73.

DOT evaluates materials to determine whether their respective characteristics, properties, and quantities in transportation merit special marking, storage, and handling procedures. DOT has determined that non-placarded shipments do not present a sufficient security risk in transportation to warrant application at this time of the TSA background check requirements to persons who possess or transport these materials, including persons subject to 18 U.S.C. 842(i). Therefore, for purposes of this rule, DOT and TSA believe it is the appropriate standard to apply. This rule should apply only to the hazardous materials endorsements that are referenced in the FMCSA and RSPA regulations.

"Convicted" means any plea of guilty or nolo contendere, or any finding of guilt. Because this rule must be consistent nationally, TSA will apply Federal law to determine whether a conviction has occurred and whether post-conviction remedies should be recognized, as TSA currently does in aviation. Also, it is important to note that for purposes of this rule, a conviction occurs when an individual is convicted of a criminal offense, receives probation, completes the probated sentence, and the individual is then discharged from probation unless the discharge is accompanied by an expungement of the underlying conviction that does not place any restriction on the individual. In most States, completion of probation does not nullify the existence of the underlying conviction.

"Final Notification of Threat Assessment" means a final determination that an individual does not meet the standards required to hold or obtain a hazardous materials endorsement. A Final Notification may not be administratively appealed.

"Incarceration" means confinement to a jail, half-way house, treatment facility, or other institution, on a full or part-time basis pursuant to a sentence imposed due to a conviction. This definition is taken from a statutory definition of "imprisoned" in 22 U.S.C. 2714, which relates to denial of passports due to certain drug offense convictions.

"Initial Notification of Threat Assessment" means an initial administrative determination by TSA that an individual poses a security threat that warrants denial of the authorization to transport hazardous materials. An Initial Notification may be administratively appealed.

"Lawful permanent resident" means an individual who has been lawfully admitted for permanent residence to the United States, as defined in 8 U.S.C. 1101. In the statute, "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

"Mental institution" means a mental health facility, mental hospital, sanitarium, psychiatric facility, and any other facility that provides diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital. This definition is taken from standards concerning individuals with a mental disability, which ATF promulgated at 27 CFR 478.11.

"Notification of No Security Threat" is an administrative determination by TSA that an individual does not pose a security threat that merits denial of the authorization to transport hazardous materials.

"Severe transportation security incident" means a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area. This definition is taken from the MTSA (46 U.S.C. 70101).

"State" means a State of the United States and the District of Columbia. This definition is taken from The Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. 31301(14), which created the CDL program.

Section 1572.5 Security threat assessment for commercial drivers licenses with a hazardous materials endorsement.

This section applies to State agencies responsible for issuing a hazardous materials endorsement for a CDL, and applicants for such endorsements. However, note that under FMCSA regulations (49 CFR 383.3(c)), individuals who operate commercial motor vehicles for military purposes (essentially uniformed members of the U.S. military) are exempt from CDL requirements. This rule does not apply to individuals exempt under 49 CFR 383.3(c).

Paragraph (b) states that within 120 days of the effective date of the rule, any CDL holder who does not meet the standards listed in this paragraph is not authorized to transport hazardous materials.

This section requires holders of a hazardous materials endorsement to relinquish the endorsement if he or she does not meet the standards set forth in § 1572.5(d). Also,

this section requires the individual in possession of a hazardous materials endorsement, who is prohibited from holding the endorsement as a result of the requirements of paragraph (b), to surrender the endorsement to the issuing State[20]. Both of these requirements become enforceable as of 120 days from the effective date of the rule. TSA will begin to do security threat assessments on hazardous material drivers shortly after this rule is published. However, the rule places a self-disclosure requirement on affected drivers, regardless of when TSA has completed an assessment on each driver. In addition, each individual with a hazardous materials endorsement has an ongoing responsibility to report if he or she is convicted of, wanted or under indictment in any jurisdiction for, or found not guilty by reason of insanity of, a disqualifying criminal offense to the issuing State entity, within 24 hours of the conviction, indictment, or finding. An individual with a hazardous materials endorsement also has an ongoing responsibility to report to the issuing State entity if he or she is adjudicated as a mental defective or committed to a mental institution, within 24 hours of the adjudication or commitment. Finally, an individual has an ongoing responsibility to report to the issuing State entity if he or she renounces his or her U.S. citizenship. The driver must surrender the hazardous materials endorsement to the issuing State within 24 hours of the conviction, finding, adjudication, commitment, or renunciation.

It is important to note here that any individual, other than an individual who does not meet the standards for a security threat assessment under sections 1572.105 (Citizenship status) and 1572.107 (Other analyses) may apply for a waiver of these

[20] It is important to note that section 1012 of the USA PATRIOT Act authorizes TSA to impose requirements on State CDL programs, but not individual CDL holders. However, TSA has authority to impose requirements on transportation workers, including threat assessments and fingerprint-based background checks under ATSA. See, 49 U.S.C. 114(f).

standards in order to obtain or hold a hazardous materials endorsement. Section 1572.143 of the rule describes the process and criteria for obtaining a waiver and is discussed in greater detail below. However, there is no restriction on when an individual may submit a waiver request. Therefore, upon publication of this rule, an individual with a disqualifying criminal offense or who was previously adjudicated as a mental defective or committed to a mental institution may apply for a waiver within the 120-day period set in paragraph (b). If TSA grants the waiver, the individual may continue to lawfully hold the hazardous materials endorsement, and, at the expiration of the 120 days following publication of the rule, would not be required to surrender the endorsement.

As noted above, TSA will begin conducting name checks on hazardous materials endorsement holders upon the effective date of the rule. If a name check of an individual indicates that he or she does not meet the security threat assessment standards, TSA will inform the State that issued the endorsement, and the State will be required to revoke the endorsement. Paragraph (b)(2) states that, for the first 180 days the rule is in effect, the individual may submit fingerprints to TSA, in a form and manner specified by TSA, when a State revokes his or her hazardous materials endorsement in response to a TSA notification that the individual poses a security threat. TSA will use the individual's fingerprints to conduct additional checks and determine if the notification was made in error.

After 180 days, each individual must submit fingerprints in a form and manner specified by TSA when applying to a State to issue, renew,[21] or transfer a hazardous materials endorsement for a CDL; and at other times as specified by TSA. A State may

[21] Until now, each State has determined the interval, if any, for renewing a hazardous materials endorsement. The companion rule that FMCSA is publishing requires States to adopt a renewal term of not more than 5 years for all hazardous materials endorsements.

require an applicant or a holder of a hazardous materials endorsement to submit fingerprints more frequently than once every five years. When submitting fingerprints under this section, the individual or his or her employer will be responsible for any fee that may be charged by the persons or entities collecting and processing the fingerprints. These fingerprinting fees will be collected when the fingerprint is captured. There are additional fees associated with accessing criminal and other pertinent databases over which TSA has no control. TSA will issue guidance to all affected individuals explaining the pertinent fee and process to forward it to the appropriate party after consulting with the States and other Federal agencies involved.

Paragraph (c) of this section provides that, for the first 180 days after the effective date of the rule, each State must revoke an individual's hazardous materials endorsement if TSA informs the State that the individual does not meet the security threat assessment standards. If TSA makes such a notification, the agency will also notify the individual. The individual then may submit his or her fingerprints if he or she believes the determination was made in error. TSA will use the fingerprints the conduct additional checks.

After 180 days following the effective date of the rule, no State may renew, issue, or transfer a hazardous materials endorsement unless TSA has notified the State that the individual does not pose a security threat. The State must notify each affected individual that he or she will be subject to a background check in order to renew a hazardous materials endorsement, at least 180 days prior to the expiration of the endorsement. Also, the State must inform the individual that he or she may initiate the security assessment at any time, but no later than 90 days before the expiration date. TSA will put forth every

effort to prevent any CDL holder from losing a hazardous materials endorsement as a result of insufficient time to complete the background check. As long as the drivers complete the application and submit fingerprints at least 90 days prior to the expiration of his or her endorsement, TSA and the State should be able to complete the review process and renew the endorsement, where appropriate.

Paragraph (c)(3) provides that between six and twelve months after the effective date of the rule, if TSA is conducting a security threat assessment on an individual applying to renew a hazardous materials endorsement, the State may extend the expiration of a hazardous materials endorsement until TSA informs the State of TSA's final determination that the individual does not pose a security threat. If the individual is applying for a new endorsement, the State may not issue the endorsement until TSA determines the individual does not pose a security threat. This time period is necessary to ensure that TSA will have sufficient time to perform the security threat assessment.

Paragraph (d) of §1572.5 establishes the standards TSA applies to determine whether an individual poses a security threat that warrants denial of a hazardous materials endorsement. The individual does not pose a security threat if he or she meets the citizenship requirements set forth in §1572.105; does not have a disqualifying criminal offense described in §1572.103; has not been adjudicated as a mental defective as prescribed in section §1572.109; and after an analysis of other databases described in §1572.107, TSA determines that the individual does not pose a security threat. This paragraph also states that the security threat assessment will be based on a combination of the individual's fingerprints, name, and other identifying information.

Paragraph 1572.5(d)(3) states that TSA will not issue a Notification of No Security Threat and will notify the FMCSA and the pertinent State if an applicant's criminal history records indicate a violation of 49 CFR 383.51. Section 383.51 of the FMCSA regulations prohibit an individual from driving a commercial motor vehicle for prescribed time periods for offenses such as driving under the influence, leaving the scene of an accident, and a felony involving the use of a commercial vehicle. This information is pertinent to whether an individual is fit to hold or obtain a hazardous materials endorsement, and should be shared with the State and FMCSA.

Paragraph (d)(4) provides that TSA may, under certain circumstances, direct a State to immediately revoke an individual's hazardous materials endorsement. If TSA determines that, in conducting the security threat assessment, it is necessary to immediately revoke the individual's hazardous materials endorsement, TSA and the State must have the authority to remove the individual from hazardous materials service. This scenario will not occur frequently, and only where sufficient legal and factual grounds exist that warrant immediate action. The individual may appeal the revocation following surrender of the endorsement, pursuant to the procedures set forth in §1572.141(i).

Paragraph 1572.5(e) specifies the information each State application must request, and each applicant must complete when applying for a new, renewal, or transfer hazardous materials endorsement.[22] This information includes the individual's name; current residential address, and all other residential addresses from the previous seven years; date of birth; social security number, or alien registration number, if the applicant is an alien; gender; city of birth, State and country of birth; and citizenship. This

[22] TSA notes that "issuing" a hazardous materials endorsement includes instances in which a State upgrades a current CDL to include a hazardous materials endorsement.

information will be used to verify the individual's identity and determine whether they meet the security threat assessment standards.

Other information provided in the application process includes: (1) a list of disqualifying crimes specified in 49 CFR 1572.103; (2) a certification that the applicant does not have a disqualifying criminal offense, as described in 49 CFR 1572.103; (3) a certification that the individual has not been adjudicated to have a mental defect or committed to a mental institution; (4) a statement informing the applicant that Federal regulations impose a continuing obligation on the applicant to disclose to the State if the applicant has committed a disqualifying criminal offense while he or she has a hazardous materials endorsement; (5) a statement concerning any military service the applicant may have completed and the kind of discharge he or she received; (6) statements required by the Privacy Act regarding the authority for collecting information from the individual, the purpose of collecting the information, and routine uses of the information; and (7) a statement that the information provided by the applicant is true, complete, and correct, and that the applicant understands that a knowing and willful false statement can be punished by fine or imprisonment, or both, and may be grounds for denial of a hazardous materials endorsement. The State also must advise the individual that TSA will provide a copy of the individual's criminal history record to him or her, if he or she requests the record in writing. The applicant must sign and date the application.

Paragraph (f) of this section states that if the criminal history records check discloses an arrest for a disqualifying crime listed in § 1572.103, but does not indicate a disposition, TSA follows the resolution procedures set forth in § 1572.103, which are discussed further below.

Paragraph (g) of this section describes when TSA must provide notification of the determination concerning the security threat assessment. Paragraph (g)(2) states that TSA will notify the individual that TSA has made an initial determination that the individual poses a security threat. The individual may appeal this initial determination, pursuant to the procedures listed in § 1572.141, or request a waiver, pursuant to the procedures listed in § 1572.143. Following resolution of any appeal or waiver, TSA will issue either a final notification of threat assessment or a determination that the individual does not pose a security threat. This final determination is not subject to appeal. However, a person may apply for a waiver following issuance of the final determination under paragraph (g)(4).

Paragraph (g)(5) describes the State notification requirements. Within 15 days of the receipt of the Notification of No Security Threat, Final Notification of Threat Assessment, or grant of a waiver, the State must: (1) update the individual's permanent record with the results of the threat assessment, issuance or denial of the endorsement, and the expiration date of the endorsement, if one is issued; (2) notify the Commercial Drivers License Information System operator of the results; and (3) revoke or deny the individual's hazardous materials endorsement, if TSA serves the State with a Final Notification of Threat Assessment; or (4) grant or renew the individual's hazardous materials endorsement, if TSA serves the State with a Notification of No Security Threat or grant of a waiver, and the individual is otherwise qualified. TSA does not require the State to take a specific action if TSA serves an Initial Notification of Threat Assessment for an applicant or holder of a hazardous materials endorsement in the State. TSA is aware that a background records check may incorrectly identify an individual as a

convicted felon, or within another prohibited category. Individuals are able to correct inaccurate records and receive clearance to obtain or renew a hazardous materials endorsement. For this reason, TSA does not wish to require revocation of the hazardous materials endorsement based on an initial review, but believes the State should be aware that the individual may be within a prohibited category under this rule. The State may take whatever action it deems appropriate or do nothing unless and until TSA has issued its final determination.

Subpart B –Standards, Appeals, and Waivers for Security Threat Assessments

Section 1572.101 Scope and definitions.

This subpart applies to individuals who have or are applying for a hazardous materials endorsement for a CDL.

The terms below have the following definitions in this subpart.

"Associate Administrator/Chief Operating Officer" means the Associate Administrator who is also the Chief Operating Officer of TSA, or his or her designee.

"Authorization" means any credential or endorsement for which TSA conducts a security threat assessment under this part, including a hazardous materials endorsement for a CDL.

"Date of service" has the same meaning as the definition of that term in the Rules of Practice in Transportation Security Administration Civil Penalty Actions and TSA's Investigative and Enforcement Procedures.[23] TSA notes that, while § 1503.211(e) of the Rules of Practice also provides for additional time for a party to act after service by mail, this rule incorporates additional time in the stated timeframes, and no additional time will

[23] See 49 CFR 1503.211(d).

be added for that purpose under this rule. The rule also provides that the date of service for an electronic-mail is the date in the electronic-mail indicating when it was sent.

"Day" means calendar day.

Section 1572.103 Disqualifying criminal offenses.

Congress did not specify in the USA PATRIOT Act which criminal offenses TSA should use to determine whether a person poses a security risk warranting denial of a hazardous materials endorsement. TSA considered the crimes listed in 49 U.S.C. 44936, which include misdemeanors and felonies, for individuals who have unescorted access to secured areas of airports or aircraft, security screeners, and other aviation personnel.

This rule includes only felonies, which constitute the most serious crimes. The list of disqualifying crimes address the use of weapons of mass destruction, financial assistance to terrorists, and general acts of terrorism, which are codified in 18 U.S.C. Chapter 113B. In addition, the list includes sedition, kidnapping, identity-fraud, improper shipment of a hazardous material; immigration violations, and a crime involving a severe transportation security incident, such as air piracy or train wrecking.

The list also includes crimes that demonstrate the individual is willing to commit violent acts against others for personal reasons, such as murder and robbery. TSA's standards are designed to prevent persons from committing violence against others in transportation. That an individual has committed criminal violence in the past is inconsistent with the need to ensure that drivers of hazardous materials will not misuse the materials. The list also includes crimes related to transporting or transferring items in an illegal manner, or with others to commit criminal acts. TSA is concerned with the possibility that such an individual could be involved intentionally, or may be used

unwittingly by others with malicious intent, in transporting items that could be used to commit terrorist acts. A crime involving a severe transportation security incident could include such things as aircraft piracy, or acts of violence against trains or other transportation systems.

The listed offenses are considered grounds for disqualification whether they were prosecuted by civilian or military authorities. If these individuals have been convicted within the preceding seven years, or incarcerated within the preceding five years, of a criminal offense listed in § 1572.103, they are disqualified.

This rule cannot possibly list all of the offenses or other information that may be relevant to determining whether an individual poses a security threat that merits denial of a hazardous materials endorsement. Therefore, under section 1572.107, TSA may consider other criminal offenses and information not listed in section 1572.103, if they indicate the individual poses a security threat. On the other hand, even if an individual has a disqualifying criminal offense, but believes that under their particular circumstances they should not be considered to pose a security threat, they may request a waiver under § 1572.143.

Under paragraph (d) of this section, certain listed disqualifying criminal offenses will not be subject to the seven and five year look back periods. These offenses are the terrorism crimes listed in 18 U.S.C. Chapter 113 B; espionage; sedition; treason; arson; improper transportation of a hazardous material; unlawful possession use, sale, distribution, or manufacture of an explosive; crimes involving a severe transportation security incident; and conspiracies or attempts to commit these crimes, where applicable. TSA believes that an individual who has one of these disqualifying criminal offenses

poses an ongoing security threat, and should not be allowed to transport hazardous materials.

TSA invites comment from all interested parties concerning this list of disqualifying criminal offenses. TSA must balance its responsibility to ensure the security of hazardous materials transportation against the knowledge that individuals may participate in criminal acts and subsequently become valuable members of the workforce. TSA wishes to minimize the adverse impact this rule may have on individuals who have committed criminal offenses and served their sentences, without compromising the security of hazardous materials in transportation. For this reason, TSA has determined that only crimes committed in the seven years prior to issuance or renewal of the hazardous materials endorsement and incarcerations that ended five years prior to issuance or renewal should disqualify an individual. This is consistent with the requirements in MTSA.

Under paragraph (c), TSA will notify an individual when his or her CHRC discloses an arrest for any disqualifying crime without indicating a disposition. The individual then must provide TSA with written proof that the arrest did not result in a disqualifying criminal offense within 30 days after the date TSA notifies the individual. If TSA does not receive such proof in 30 days, TSA may serve the individual with an Initial Notification of Threat Assessment.

Section 1572.105 Citizenship status.

The USA PATRIOT Act and SEA require a check of the relevant databases to determine the status of aliens under U.S. immigration laws. This rule requires an individual applying for a hazardous materials endorsement to be either a U.S. citizen or a

lawful permanent resident of the U.S. As noted above, the SEA does not prohibit lawful permanent residents and other narrow categories of aliens from transporting explosives.[24] However, FMCSA's CDL regulations require a CDL holder to have a "State of domicile," which is defined as "that State where a person has his/her true, fixed, and permanent home and principal residence and to which he/she has the intention of returning whenever he/she is absent."[25] Lawful permanent residents of the U.S. are the only aliens who have a State of domicile under this definition. Thus, they are the only aliens who are permitted to have a CDL. In the case of an individual who is a lawful permanent resident, TSA will check relevant databases to determine the status of the individual under the immigration laws of the U.S.

To determine an individual's citizenship status, TSA may check the relevant immigration databases, and may perform other checks, including verifying the validity of the individual's Social Security Number. We note that § 383.71(a)(9) of the companion FMCSA rule requires drivers to provide proof of citizenship or alien status when applying for a hazardous materials endorsement.

Section 1572.107 Other analyses.

The USA PATRIOT Act also requires that background checks under section 1012 include a check of relevant international databases through Interpol-U.S. National Central Bureau, or other appropriate means. Therefore, TSA will check these international databases when appropriate. In addition, TSA will check other databases that include information on terrorists, fugitives from justice, renunciants, and individuals who have been declared mental defectives, and, where appropriate, may also check databases that

[24] 18 U.S.C. 842(i)(5).
[25] 49 CFR 383.5.

assist in confirming an individual's identity. This rule provides that TSA will check the following databases, and conduct a security threat analysis, before determining that an individual does not pose a security threat: (1) Interpol and other international databases; (2) watchlists; and (3) other databases relevant to determining whether an individual poses a security threat or that confirm an individual's identity. TSA is not initiating any independent investigation of a CDL holder's activities and affiliations and has no plans to engage in such reviews.

Section 1572.109 Mental defects.

The SEA prohibits individuals who have been adjudicated as having a mental defect from transporting explosives. This rule implements that portion of the SEA, by determining that any person who has been determined to be a mental defective does not meet the standards for a security threat assessment. This section adopts terms and standards concerning individuals with mental disabilities that ATF promulgated to implement the Brady Handgun Violence Prevention Act.[26] In the notice proposing these standards, ATF stated:

> The legislative history of the GCA [Gun Control Act of 1968] makes it clear that a formal adjudication or commitment by a court, board, commission or similar legal authority is necessary before firearms disabilities are incurred. H.R. Rep. 1956, 90th Cong., 2d Sess. 30 (1968). The plain language of the statute makes it clear that a formal commitment, for any reason, e.g., drug use, gives rise to firearms disabilities. However, the mere presence of a person in a mental institution for observation or a voluntary commitment to a mental hospital does not result in firearms disabilities.[27]

ATF also cited several cases in which courts held that the GCA was designed to prohibit the receipt and possession of firearms by individuals who are potentially

[26] Pub. L. 103-159, November 30, 1993, 107 Stat. 1536, amending the Gun Control Act of 1968. See 27 CFR 478.11.
[27] 61 FR 47095, September 6, 1996.

dangerous, including individuals who are mentally incompetent or afflicted with a mental illness, and individuals found not guilty by reason of insanity in a criminal case.[28] Finally, ATF added to the definition of "adjudicated as mental defective" an element from the Department of Veterans Affairs definition of "mental incompetent" – an individual who because of injury or disease lacks the mental capacity to contract or manage his or her own affairs.[29]

An individual has a mental defect, for purposes of this rule, if he or she has been committed to a mental institution or has been adjudicated as a mental defective. An individual is adjudicated as a mental defective if a court or other appropriate authority determines that the individual is a danger to him or herself, or lacks the mental capacity to manage his or her affairs. An individual is "committed to an institution" if formally committed by a court; this term does not refer to voluntary admissions to a mental institution or hospital.

Section 1572.141 Notification of Threat Assessment and Appeal.

In this rule TSA is establishing an appeals process for individuals found to be ineligible for an authorization. This section provides that if, after conducting the security threat assessment, TSA determines that an individual poses a security threat warranting denial of the hazardous materials endorsement, TSA will provide the individual an Initial Notification of Threat Assessment. The Initial Notification will include: (1) a statement that TSA has determined that the individual poses a security threat, (2) the bases for the determination, and (3) information about the process for appealing the determination.

[28] Id.
[29] Id.

TSA will provide an individual, upon request, an opportunity for the Associate Administrator/Chief Operating Officer of TSA, or his or her designee, to review the bases of an Initial Notification of Threat Assessment. This review is initiated through the individual appealing the Initial Notification.

As set forth in paragraph (c), an individual may appeal an Initial Notification only if he or she asserts that he or she satisfies the standards for the security threat assessment. For example, if the Initial Notification was based on a conviction for a disqualifying crime, the individual may provide TSA with evidence that the conviction was pardoned, expunged, or overturned on appeal. Evidence of such actions may nullify a conviction for a disqualifying crime, but only if no restrictions are imposed on the individual based on the underlying conviction. If, for example, an individual received an executive pardon for a conviction for a disqualifying crime, but the pardon prohibits the individual from possessing a firearm, or imposes any other restrictions, the pardon will not nullify the conviction.

Pursuant to paragraph (d), an individual may initiate an appeal by providing TSA with a written request for the releasable materials upon which the Initial Notification was based, or by serving TSA with his or her written reply to the Initial Notification.

If an individual wishes to receive copies of the releasable material upon which the Initial Notification was based, he or she must serve TSA with a written request not later than 15 days after the date of service of the Initial Notification. TSA will respond to this request not later than 30 days after TSA is served with the individual's request. TSA will not provide any classified information, as defined in Executive Order 12968, or any other information or material protected from disclosure by law, in its response.

If an individual wishes to reply to the Initial Notification, he or she must provide TSA with a written reply not later than 15 days after the date of service of the Initial Notification or the date of service of TSA's response to the individual's request for materials, if the individual made such a request. In an individual's reply, TSA will consider only material that is relevant to whether the individual satisfies the standards for the security threat assessment.

Under paragraph (d)(3) of this section, an individual has the opportunity to correct his or her criminal history record. If an individual's record discloses disqualifying information, TSA will notify the individual of the adverse information and provide a copy of the record, if requested. If the individual wishes to correct the inaccurate information, he or she must provide written proof that the arrest did not result in a disqualifying criminal offense. The individual may contact the local jurisdiction responsible for the information, the FBI, or any other relevant agency to complete or correct the information contained in his or her record. The individual must provide TSA with the revised FBI or other agency record, or a certified true copy of the information from the appropriate court, before TSA determines that the individual satisfies the standards for the security threat assessment.

In considering an appeal, the TSA Associate Administrator/Chief Operating Officer reviews the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, and any other materials or information available to TSA. The Associate Administrator/Chief Operating Officer may affirm the Initial Notification by concluding that an individual poses a security threat. In this case, as set forth in paragraph (e), TSA will serve upon the individual a Final Notification of Threat

Assessment. The Final Notification includes a statement that the Associate Administrator/Chief Operating Officer has reviewed the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to him and has determined that the individual poses a security threat. There is no administrative appeal of the Associate Administrator/Chief Operating Officer's decision. However, as explained below, the individual may apply for a waiver. For purposes of judicial review, the Final Notification of Threat Assessment constitutes a final TSA order.

Paragraph (e)(3) sets forth the procedures TSA will follow if, upon review, the Associate Administrator/Chief Operating Officer does not determine that the individual poses a security threat. TSA serves a Withdrawal of the Initial Notification on the individual and provides a notice approving the hazardous materials endorsement to the State in which the individual applied for the endorsement.

If the applicant does not initiate an appeal or waiver request within 30 days of service of the Initial Notification, TSA issues a Final Notification of Threat Assessment. Unless the individual applies for and obtains a waiver, issuance of the Final Notification results in the revocation or denial of the individual's hazardous materials endorsement.

If TSA did not serve the individual with an Initial Notification of Threat Assessment, or grants a waiver, the agency will transmit a Notification of No Security Threat to the individual and the State in which the individual applied for the endorsement.

Under the rule, TSA has the discretion to extend due dates both for an individual and for the agency. An individual must provide, in writing, a statement of good cause for

extending the due date, at least two days prior to the due date to be extended. TSA anticipates that if an individual is attempting to correct erroneous records or gathering documents in support of a waiver request, the individual may need additional time because other entities do not produce the documents quickly. So long as the applicant provides an explanation of such problems, TSA will extend the time needed to complete the process.

Paragraph (i) of this section describes the procedure for appealing an immediate revocation of the hazardous materials endorsement. This may occur under rare circumstances where TSA determines during the course of conducting a security threat assessment, that sufficient factual and legal grounds exist to warrant immediate revocation. Under these circumstances, the individual must surrender the endorsement and cease transporting hazardous materials. TSA understands that removing the individual from service without an opportunity to correct the record may have adverse consequences, but TSA anticipates that this mechanism will not be used often. The individual may appeal this decision with 10 days, and must include all supporting documentation when he or she submits the appeal. TSA will provide a determination on the appeal within 10 days.

The rule provides that in connection with this subpart, TSA does not disclose to the individual classified information, as defined in Executive Order 12968 section 1.1(d), and TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law, such as Sensitive Security Information (SSI); sensitive law enforcement and intelligence information; sources,

methods, means, and application of intelligence techniques; and identities of confidential informants, undercover operatives, and material witnesses.

For determinations under § 1572.107, the determination that an individual poses a security threat will be based, in large part or exclusively, on classified national security information, unclassified information designated as SSI, or other information that is protected from disclosure by law.

Classified national security information is information that the President or another authorized Federal official has determined, pursuant to Executive Order 12958, must be protected against unauthorized disclosure in order to safeguard the security of American citizens, the country's democratic institutions, and America's participation within the community of nations.[30] Executive Order 12968 prohibits Federal employees from disclosing classified information to individuals who have not been cleared to have access to such information under the requirements of that Executive Order.[31] If the Assistant Administrator has determined that an individual who is the subject of a threat assessment proceeding poses a threat to transportation security, that individual will not be able to obtain a clearance to have access to classified national security information, and TSA has no authority to release such information to that individual.

The denial of access to classified information under these circumstances is consistent with the treatment of classified information under the Freedom of Information Act (FOIA), which specifically exempts such information from the general requirement under FOIA that all government documents are subject to public disclosure.[32]

[30] See E.O. 12958, 60 FR 19825, April 20, 1995.
[31] See E.O. 12968 sec. 3.2(a), 6.2(a)(1), 60 FR 40245, Aug. 7, 1995.
[32] See 5 U.S.C. 552 (b)(1).

SSI is unclassified information that is subject to disclosure limitations under statute and TSA regulations.[33] Under 49 U.S.C. 114(s), the Administrator of TSA may designate categories of information as SSI if release of the information would be detrimental to the security of transportation. The SSI designation allows TSA to limit disclosure of this information to people with a need to know in order to carry out regulatory security duties.[34]

Among the categories of information that the Administrator has defined as SSI by regulation is information concerning threats against transportation.[35] Thus, information that TSA obtains indicating that an individual poses a security threat, including the source of such information and the methods through which the information was obtained, will commonly be SSI or classified information. The purpose of designating such information as SSI is to ensure that those who seek to do harm to the transportation system and their associates and supporters do not obtain access to information that will enable them to evade the government's efforts to detect and prevent their activities. Disclosure of this information, especially to an individual specifically suspected of posing a threat to the transportation system, is precisely the type of harm that Congress sought to avoid by authorizing the Administrator to define and protect SSI.

Other types of information also are protected from disclosure by law due to their sensitivity in law enforcement and intelligence. In some instances, the release of information about a particular individual or his supporters or associates could have a substantial adverse impact on security matters. The release of the identities or other information regarding individuals related to a security threat determination by TSA could

[33] See 49 U.S.C. 114(s); 49 CFR part 1520.
[34] See 49 CFR 1520.5(b).
[35] See 49 CFR 1520.7(i).

jeopardize sources and methods of the intelligence community, the identities of confidential sources, and techniques and procedures for law enforcement investigations or prosecution.[36] Release of such information also could have a substantial adverse impact on ongoing investigations being conducted by Federal law enforcement agencies, possibly giving a terrorist organization or other group a roadmap of the course and progress of an investigation. In certain instances, release of information could alert a terrorist's co-conspirators to the extent of the Federal investigation and the imminence of their own detection, thus provoking flight.

For the reasons discussed above, TSA does not intend to provide any classified information to the individual, and TSA reserves the right to withhold SSI or other sensitive material protected from disclosure under law. As noted above, TSA expects that information will be withheld only for determinations based on § 1572.107, which involve watchlists and other databases. When the determination is based on the individual's criminal history or alien status, TSA expects that the supporting records most likely will be disclosed to the individual upon a written request to TSA.

Section 1572.143 Waivers.

Certain individuals may request a waiver, which permits the individual to hold or obtain a hazardous materials endorsement even if he or she does not meet the standards for the authorization. For instance, TSA believes that individuals who have committed a disqualifying crime may be rehabilitated to the point that they may be trusted in potentially dangerous jobs, such as the transportation of hazardous materials. The rule provides criteria that TSA will consider if the individual does not meet the criminal history standards. TSA believes that these factors are good indicators that an individual

[36] See 5 U.S.C. 552(b)(7)(D), (E).

may be rehabilitated to the point that a waiver is advisable. The factors are: (1) the circumstances of the disqualifying act or offense; (2) restitution made by the individual; (3) Federal or State mitigation remedies; and (4) other factors TSA believes bear on the individual's potential security threat. These factors are set forth in the MTSA, at 46 U.S.C. 70105(c)(2).

TSA is developing internal criteria that will be used to determine whether a waiver should be granted to ensure uniform application of the waiver process. For instance, TSA may grant waivers to individuals who have been adjudicated as a mental defective or committed to a mental institution, as specified in § 1572.109. A basis for a waiver may include a requirement that a court, board, commission, or other lawful authority has determined that the individual is no longer a danger to him- or herself or others, or is capable of managing his or her own affairs. TSA requests comment on the appropriate criteria the agency should consider when determining whether to grant a waiver to these individuals.

In reviewing waiver applications, TSA may consider the U.S. Sentencing Guidelines as informal guidance. The Guidelines address the mitigation of federal sentences and explain the factors and circumstances that should be considered when departing from standard federal sentences.

Also, TSA is considering placing additional criteria in the rule for determining whether a waiver should be granted to an individual with a disqualifying offense. The criteria include: (1) at least three years have elapsed from the date the individual was released from incarceration for the offense to the date the individual is applying for the waiver; (2) the individual provides written proof that he or she has successfully

completed or is currently meeting the conditions of his or her parole or probation; and (3) the individual has not been arrested within those three years. TSA requests comments on whether these factors should be added to the rule.

Note that TSA will not grant waivers from the standards in § 1572.107. Determinations under that section already take into account individual circumstances, and do not contain specific criteria on which TSA could base a decision to grant or deny a waiver. An individual is finally denied under § 1572.107 only after TSA has considered all of the circumstances. While the individual may appeal an Initial Notification of Threat Assessment issued under that section, once TSA determines that the individual does not meet the standards, no waiver is appropriate. Also, individuals who do not meet the citizenship requirements of the rule are not subject to a waiver. As noted above, FMCSA regulations require CDL holders to be U.S. citizens or lawful permanent residents of the U.S., and TSA cannot waive that requirement.

After reviewing an individual's application for a waiver, TSA will send a written decision to the individual and, if the waiver is granted, the State in which the individual applied for the hazardous materials endorsement within 30 days of the date of the individual's application for a waiver.

RULEMAKING ANALYSES AND NOTICES:

Justification for Immediate Adoption

TSA is issuing this final rule without prior notice and opportunity to comment pursuant to its authority under section 4(a) of the Administrative Procedure Act (5 U.S.C. 553(b)). This provision allows the agency to issue a final rule without notice and

opportunity to comment when the agency for good cause finds that notice and comment procedures are "impracticable, unnecessary or contrary to the public interest."

The catastrophic effect of the attacks on the World Trade Center and Pentagon on September 11, 2001, revealed the vulnerability of the nation's transportation system to terrorism. National security and intelligence officials have warned that future terrorist attacks are likely. The number of commercial vehicles that carry hazardous materials is far greater than the number of aircraft that might be hijacked by terrorists. A vehicle carrying hazardous materials, if used as a weapon in a terrorist attack, could cause significant loss of life and property damage.

Section 1012 of the USA PATRIOT Act is a measure to increase the security of highway transportation of hazardous materials. The DOT began developing this rule as soon as the USA PATRIOT Act was enacted. Because of the likelihood of future terrorist attacks, and the potential for significant casualties and property damage in the event of a terrorist attack involving a vehicle carrying hazardous materials, FMCSA and TSA believe that immediate action is warranted, and TSA finds that notice and public comment procedures under 5 U.S.C. 553(b) are impracticable and contrary to the public interest. The delays inherent in such a process could make the difference between preventing and overlooking a terrorist threat.

However, TSA is not making the procedures for fingerprint checks that will eventually be included in this rule effective upon publication because the development of those procedures will require additional consultation with the States. Delaying the full implementation of the security threat assessment process, including submission of fingerprints, for 180 days will give the States, the DOJ, and TSA a sufficient amount of

time to develop the infrastructure and procedures to complete the fingerprint requirements that will be a part of this rule. By publishing this rule now and making it effective immediately, however, TSA can begin checking individuals against terrorist watchlists and other databases using names and other databases, including the FBI's criminal history database, using names and other information, to begin to determine if any individuals pose a security threat. In addition, the rule places a self-disclosure requirement on individuals who hold hazardous materials endorsements.

TSA is requesting public comments on the rule. The agency will consider all comments received on or before the closing date for comments. Late-filed comments will be considered to the extent practicable. If changes to the rule are necessary to address transportation security more effectively, or in a less burdensome but equally effective manner, TSA will not hesitate to make such changes.

Regulatory Evaluation

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order.

TSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in security issues since the events of September 11, 2001. This interim final rule responds to the background check requirements of section 1012 of the USA PATRIOT Act by establishing the criteria and procedures TSA will follow in determining whether an individual applying for, transferring, or renewing a hazardous materials (HM)

endorsement for a commercial drivers license (CDL) poses a security risk warranting denial of the endorsement.

TSA has performed a preliminary analysis of the expected costs of this interim final rule for a 10-year period, from 2003 though 2012. Figures may change in the full Regulatory Evaluation that will be completed in the near future. As required by the Office of Management and Budget (OMB), the present value of this cost stream is calculated using a discount factor of 7 percent. All costs in this analysis are expressed in 2002 dollars. TSA requests comments on all methodologies, factors or numbers contained in this analysis, and will consider responses in the final rule analysis.

Increment Rule Cost

Table 1 summarizes the estimated incremental compliance costs associated with this rule. It is estimated that this rule will cost $633 million (present value, $470 million) over 10 years.

Table 1 (million)

	Nominal Value	**Present Value**
Population	8.7	--
Direct Costs		
Fingerprint Capture	$434	$320
Government Impact	$55	$43
State Impact	$.8	$.8
Total Direct Costs	**$490**	**$364**
Opportunity Costs		
Lost Time	$143	$106
Total Rule Cost	**$633**	**$470**

Background Check Population

The primary incremental cost component of this rule is the cost associated with the fingerprinting process. Under this rule, 180 days after the effective date of the rule applicants must have successfully completed a fingerprint-based criminal history records check (CHRC) prior to receiving a new, renewed or transferred hazardous materials endorsement. Based on figures from the Federal Motor Carrier Safety Administration (FMCSA), it is estimated that there are currently 3.5 million drivers holding a CDL with a hazardous materials endorsement. A pending rule from the FMCSA will require States to require drivers to renew their hazardous materials endorsement every five years. Therefore, it is assumed that one-fifth of that number will apply for renewal each year.

Growth for drivers affected by this rule is estimated to be 2.8 percent annually. This projection is the aggregate growth rates of the three primary occupational categories requiring CDLs, based on Bureau of Labor Statistics' Occupational Employment Projections. This figure accounts for growth and net replacement to the CDL work force. Specific data on drivers holding a CDL with a hazardous materials endorsement is not available at this time. However, this growth number is considered representative for cost estimating purposes. As shown in Table 2, this rule will require a total population of 8.7 million to be fingerprinted over a ten-year period.

Table 2 (,000)

Year	Number	Growth	Renewals	CHRC Population
2003	3,500	--	681	681
2004	3,598	98	700	798
2005	3,699	101	720	820
2006	3,802	103	740	843
2007	3,908	106	760	867

2008	4,018	109	782	891
2009	4,130	112	804	916
2010	4,245	116	826	941
2011	4,364	119	849	968
2012	4,486	122	873	995
		986	7,734	8,720

Name Checks

Following publication of the rule, TSA will begin to conduct security threat assessments on hazardous materials endorsement holders using names and biographical data contained in the Commercial Driver's License Information System (CDLIS). Some assessments will include checking names against the National Crime Information Center (NCIC) database, the Interstate Identification Index (III), and other databases, such as terrorism watch lists. FMCSA conducted a similar check after September 11, 2001. Industry incremental costs from this requirement are considered to be di minimis, because the information already is available and much of the process is automated. However, there is an incremental cost to the government, which is discussed later in this section.

Fingerprinting Cost

Estimates for the cost of the fingerprinting process vary considerably and depend on where and how the fingerprints are collected and processed. Some State DMVs are currently equipped to process fingerprints. For other states, it is anticipated that individuals will use local police stations for fingerprinting. Processing costs of approximately $50 per individual consist of the following elements: $22 fee to the FBI for processing fingerprints, approximately $7.00 to the Office of Personnel Management (OPM) Special Agreement Checks Billing Rates for Regulatory Purpose fingerprints, $16 personnel cost to take the fingerprints, complete the paperwork and forward for

processing, and $5.00 for fingerprint cards and material. Using these assumptions, it is estimated that the cost to conduct a fingerprint-based background check on 8.7 million individuals over a ten-year period is $434 million (present value, $320 million).

Lost Time

There are additional factors, such as opportunity costs, that complicate estimating the industry's incremental compliance costs associated with this interim final rule. One is the amount of time an employee spends submitting to fingerprinting, which is an opportunity cost. This time can vary considerably based on distance the individual has to travel and the wait time. Based on similar analyses of the background check process for aviation security rules, TSA estimates that it will take one hour of an individual's time to comply with the fingerprinting requirement. Based on the Bureau of Labor Statistics, 2001 National Occupational Employment and Wage Estimates, the mean hourly wage of a commercial truck driver is approximately $16.00 (2002 dollars). Using these assumptions, it is estimated that the cost of lost time associated with this rule over a ten-year period is $143 million (present value, $106 million).

Government Impact

There are two primary incremental cost components of this rule for the government. First, as previously discussed in the Name Checks section, TSA will conduct name checks on current drivers with hazardous materials endorsements for the first 180 days after the rule becomes effective. For purposes of this analysis, we have used one year in order to be certain that all costs are considered. This one-year cost consists of staffing an office to administer the name-based background check process (labor, other direct costs, and etc.). It is estimated that it will take approximately 53 staff-

years to process and adjudicate the results of this check. This estimate is based on 25 percent of the names returning results that require further review, with each review taking, on average 5 minutes, to complete. The fully loaded labor rate for personnel conducting these reviews is approximately $40.00 an hour. The one-year cost to process and adjudicate these checks is estimated to be $4.6 million (present value, $4.6 million).

Applicants notified of disqualifying offenses have the right to appeal and apply for a waiver under this rule. It is estimated that it will take approximately 6.4 staff-years to process and respond to these appeals. This figure is based on an estimate of 1 percent of those individuals notified of disqualifying offenses electing to appeal and apply for a waiver of the initial notification, with each action taking, on average, 1 hour to process. The fully loaded labor rate for personnel processing these actions is approximately $40.00 an hour. The one-year cost for appeals and waivers, including labor and other direct costs, of the name-based background check is estimated to be $559,000 (present value, $559,000). The total one-year incremental cost to the Government for the entire name-based background check process is estimated to be $5.2 million (present value, $5.2 million).

The second primary incremental cost component is associated with recurring fingerprint-based checks required for new, renewed or transferred hazardous materials endorsements. It is estimated that it will take approximately 40 staff-years to adjudicate the fingerprint check results. This estimate is based on 25 percent of the checks returning results that require further review, with each review taking, on average, 5 minutes to complete. The fully loaded labor rate for personnel conducting these reviews is approximately $40.00 an hour. The incremental cost to adjudicate these results,

including labor and other direct costs, over a ten-year period is estimated to be $44.4 million (present value, $33.8 million).

Consistent with the name-based check, applicants notified of disqualifying offenses have the right to appeal and apply for a waiver under this rule. It is estimated that it will take approximately 4.8 staff-years to process and respond to these actions. This figure is based on an estimate of 1 percent of those individuals notified of disqualifying offenses electing to appeal or apply for a waiver of the initial notification, with each action taking, on average, 1 hour to process. The fully loaded labor rate for personnel processing these actions is approximately $40.00 an hour. The incremental cost to adjudicate these actions, including labor and other direct costs, over a ten-year period is estimated to be $4.2 million (present value, $3.2 million). The total incremental cost to the Government for the fingerprint process over a ten-year period is estimated to be $48.6 million (present value, $36.9 million).

To implement these processes, TSA will need to modify current systems to handle name check and fingerprint check data. The one-time cost of these changes is estimated to be $450,000 to modify existing software programs to store data, and to train system users and administrators. Annual maintenance costs associated with administration of this system are estimated to be $90,000 annually. Using these assumptions, it is estimated that the incremental cost associated with TSA systems over a ten-year period is $1.35 million (present value, $1.13 million).

Using these assumptions, it is estimated that the total increment cost impact on the government of this final rule over a ten-year period is $55.2 million (present value, $43.3 million).

States Impact

Every State and the District of Columbia has a Department of Motor Vehicles (DMV) that administers records for all of its licensed drivers, including programs for CDLs and HM endorsements. This rule may require States to change procedures for issuing HM endorsements and, therefore, has an incremental cost. States will have to develop and implement procedures to process background check information for all applicants for an HM endorsement.

The Association of American Motor Vehicle Administrators (AAMVA) estimates that it will cost States $15,000 each to upgrade computer systems to handle these requirements. This amount includes a one–time cost to modify existing software programs to store data, train system users and administrators, and modest informational outreach to interested parties concerning the changes. It is assumed that all of these activities can occur with existing equipment. To obtain the $15,000 estimate, AAMVA looked at several State motor vehicle data systems retrofits that they believe were comparable to the changes required by this IFR. Using these assumptions, it is estimated that the incremental cost of computer system and process changes over a ten-year period is $765,000 (present value, $765,000).

Benefits

The primary benefit of the rule will be increased protection to U.S. property, citizens and others traveling in the U.S. from acts of terrorism. The changes envisioned in this interim final rule are an integral part of the total program needed by the transportation industry to prevent a terrorist incident in the future.

As stated previously in this preamble, part of TSA's mission is to ensure the security of hazardous materials in transportation so that these materials are not used in an act of terrorism. Two tragedies provide examples of the harm that can occur from explosive material delivered in a van or light truck; the 1993 New York World Trade Center (WTC) and the 1995 Oklahoma City Federal Building. Although drivers with hazardous material endorsements did not perpetrate these terrorist acts, the examples do provide a basis of comparison. Vehicles used in the transportation of hazardous materials typically have much larger capacities than the vehicles used in these two incidents. If these vehicles were used to carry out a terrorist act, the damage would be far greater. If certain hazardous materials were involved, if could affect an even greater number of people and amount of property over a larger area.

The 1993 WTC bombing killed six people, injured over 1,000, and resulted in over $510 million in insured losses. The Oklahoma City bombing killed 168 people, injured 601, and resulted in over $125 million in insured losses. In order to provide a benchmark comparison of the expected benefits of this final rule with estimated costs in dollars, a minimum of $3.0 million is used as the value of avoiding a fatality (based on the willingness to pay approach for avoiding a fatality). The value of avoiding bodily injury depends on the severity of the injury and ranges from $6,000 for a minor injury to $2.3 million for a critical injury. These figures are based on Economic Values for Evaluation of Federal Aviation Administration Investment and Regulatory Programs (Economic Values), FAA-APO-98-8, June 1998, adjusted to 2002 dollars.

The intent of this rule is to prevent a terrorist attack similar to, or worse than, these examples. The 1993 WTC resulted in $113 million in loss of life and bodily injury,

and over $510 million in insured losses (based on figures from the Federal Emergency Management Agency). Total losses are estimated to be $623 million (present value, $468 million). The 1995 Oklahoma City bombing resulted in $560 million in loss of life and bodily injury, and over $125 million in insured losses. Total losses are estimated to be $685 million (present value, $514 million). The prevention of one of these tragedies would offset the cost of this final rule, and supports the rule as cost-beneficial.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980, as amended, (RFA) was enacted by Congress to ensure that small entities (small businesses, small not-for-profit organizations, and small governmental jurisdictions) are not unnecessarily or disproportionately burdened by Federal regulations. The RFA requires agencies to review rules to determine if they have "a significant economic impact on a substantial number of small entities." TSA has determined that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Current industry practice is for drivers to obtain their CDL certification as a condition of employment. Individuals are required to have a current CDL with appropriate endorsements to be eligible for employment. This is an employment cost typically bourn by the individual employee. Therefore, the burden on small business entities from this final rule is expected to be de minimis.

TSA conducted the required review of this rule and determined that it will not have a significant economic impact. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), TSA certifies that this rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), a Federal agency must obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. This interim final rule contains the following new information collection requirements.

This rule contains information collection activities subject to the Paperwork Reduction Act (44 U.S.C. 3507(d)) (PRA). Accordingly, the paperwork burden associated with the rule will be submitted to the Office of Management and Budget (OMB) for review. As protection provided by the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this information collection will be published in the Federal Register after the Office of Management and Budget has approved it.

Need: Truck drivers will complete an application and provide fingerprints for the purpose of conducting a background check. It is anticipated that State and local agencies will collect this information when individuals apply for, renew or transfer commercial drivers licenses that includes a hazardous material endorsement. This information will be used to conduct background checks to ensure that these individuals do not have a disqualifying criminal offense, as described in 49 CFR 1572.103

Description of Respondents: Individuals applying for, renewing or transferring a hazardous materials endorsement for a CDL.

Burden: It is estimated that 3.5 million people have hazardous material endorsements for a CDL. This number is expected to grow by approximately 2.8%

people per year for a ten-year total of approximately 4.5 million people (450,000 annualized). The number of fingerprint applications to be collected over a ten-year period is approximately 8.7million (870,000 million annualized). This number includes new applicants and renewals, which on average, occur every five years.

Fingerprint costs consist of a processing fee, processing time, and material. The average cost for the fingerprint process is approximately $50 per set. It is estimated that it will take an average of thirty minutes to complete an FBI fingerprint card and forward it to the FBI for further processing. Based on these factors, it is estimated that the background check process will involve 4.4 million hours over the ten-year (436,000 annualized) and will cost $452 million over the ten-year period ($45.2 million annualized).

TSA requests comments on the estimates of the paperwork and information collection burden, and whether these burdens can be minimized. TSA believes that requesting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by this regulation.

Executive Order 13132 (Federalism)

Executive Order 13132 requires TSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the

various levels of government." Under the Executive Order, TSA may construe a Federal statute to preempt State law only where, among other things, the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

This action has been analyzed in accordance with the principles and criteria in the Executive Order, and it has been determined that this interim final rule does have Federalism implications or a substantial direct effect on the States. The rule does not presently require States to collect or process fingerprints. TSA will be developing those procedures in consultation with the States over the next 180 days.

TSA notes that FMCSA has communicated with the States on the requirements of the USA PATRIOT Act. The Assistant Administrator of FMCSA wrote to licensing officials in each State on October 31, 2001, briefly summarizing section 1012 of the USA PATRIOT Act, and asking them to continue issuing and renewing hazardous materials endorsements until the regulations implementing section 1012 were completed. Some States have already enacted legislation they consider necessary to carry out the mandates of section 1012.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires TSA to identify and consider a reasonable number of

regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows TSA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted.

This interim final rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Thus, TSA has not prepared a written assessment under the UMRA.

Environmental Analysis

TSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this final rule will not have any significant impact on the quality of the human environment.

Energy Impact

TSA has assessed the energy impact of this rule in accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94-163, as amended (42 U.S.C. 6362). TSA has determined that this rule is not a major regulatory action under the provisions of the EPCA.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international

standards and, where appropriate, that they be the basis for U.S. standards. TSA will continue to consult with Mexico and Canada under the North American Free Trade Agreement to ensure that any adverse impacts on trade are minimized. This rule applies only to individuals applying for a State-issued hazardous materials endorsement for a commercial drivers license. Thus, TSA has determined that this rule will have no impact on trade.

List of Subjects in 49 CFR Parts 1570 and 1572

Commercial drivers license, Criminal history background checks, Explosives, Hazardous materials, Motor carriers, Motor vehicle carriers, Security measures, Security threat assessment.

The Amendments

For the reasons set forth in the preamble, the Transportation Security Administration amends 49 CFR Chapter XII, Subchapter D as follows:

SUBCHAPTER D – MARITIME AND LAND TRANSPORTATION SECURITY

1. Add a Part 1570 to read as follows:

PART 1570 – LAND TRANSPORTATION SECURITY: GENERAL RULES

Sec.

1570.1 Scope.

1570.3 Fraud and intentional falsification of records.

Authority: 49 U.S.C. 114, 40113, 46105.

§ 1570.1 Scope.

This part applies to any person involved in land transportation as specified in this part.

§ 1570.3 Fraud and intentional falsification of records.

No person may make, or cause to be made, any of the following:

(a) Any fraudulent or intentionally false statement in any record or report that is kept, made, or used to show compliance with this subchapter, or exercise any privileges under this subchapter.

(b) Any reproduction or alteration, for fraudulent purpose, of any record, report, security program, access medium, or identification medium issued under this subchapter or pursuant to standards in this subchapter.

PART 1572 – CREDENTIALING AND BACKGROUND CHECKS FOR LAND TRANSPORTATION SECURITY

2. Revise the authority citation for part 1572 to read as follows:

Authority: 49 U.S.C. 114, 5103a, 40113, 46105.

3. Sections 1572.1-1572.11 are designated as subpart A with the following heading to read as follows:

Subpart A – Requirements to Undergo Security Threat Assessments

4. Add a new section 1572.3 to read as follows:

§ 1572.3 Terms used in this part.

For purposes of this part:

Alien means any person not a citizen of the United States.

Alien registration number means the number issued by the United States Department of Homeland Security to an individual when he or she becomes a lawful permanent resident of the United States.

Commercial drivers license (CDL) is used as defined in 49 CFR 383.5.

Convicted means any plea of guilty or nolo contendere, or any finding of guilt.

Endorsement is used as defined in 49 CFR 383.5.

Final Notification of Threat Assessment means a final administrative determination by TSA that an individual poses a security threat warranting denial of the authorization for which the individual is applying.

Hazardous materials is used as defined in 49 CFR 383.5.

Incarceration means confined or otherwise restricted to a jail-type institution, half-way house, treatment facility, or another institution, on a full or part-time basis pursuant to a sentence imposed as the result of a conviction.

Initial Notification of Threat Assessment means an initial administrative determination by TSA that an individual poses a security threat warranting denial of the authorization for which the individual is applying.

Lawful permanent resident means an individual who has been lawfully admitted for permanent residence to the United States, as defined in 8 U.S.C. 1101.

Mental institution means a mental health facility, mental hospital, sanitarium, psychiatric facility, and any other facility that provides diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

Notification of No Security Threat means an administrative determination by TSA that an individual does not pose a security threat warranting denial of the authorization for which the individual is applying.

Severe transportation security incident means a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area.

State means a State of the United States and the District of Columbia.

5. Add a new section 1572.5 to read as follows:

§ 1572.5 Security threat assessment for commercial drivers' licenses with a hazardous materials endorsement.

(a) Scope. This section applies to State agencies responsible for issuing hazardous materials endorsements for a commercial drivers license, and individuals who hold or are applying for such endorsements, under 49 CFR Part 383.

(b) Individuals. (1) Requirements. Beginning on [INSERT DATE 120 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]:

(i) Prohibitions. No individual may hold a CDL with a hazardous materials endorsement, or exercise the privileges of a hazardous materials endorsement, if:

(A) The individual does not meet the citizenship status requirements in § 1572.105;

(B) The individual has a disqualifying criminal offense, as described in § 1572.103;

(C) The individual has been adjudicated as a mental defective or committed to a mental institution, as described in § 1572.109; or

(D) TSA has notified the individual that he or she poses a security threat warranting denial of the endorsement, as described in § 1572.107.

(ii) Surrender of endorsement. An individual who is prohibited from holding a CDL with a hazardous materials endorsement under this section must surrender the hazardous materials endorsement to the issuing State.

(iii) Continuing responsibilities. Each individual with a hazardous materials endorsement who is convicted of, wanted, or under indictment in any jurisdiction, civilian or military, for, or found not guilty by reason of insanity of, a disqualifying crime listed in § 1572.103; who is adjudicated as a mental defective or committed to a mental institution as specified in § 1572.109; or who renounces his or her U.S. citizenship; must report the offense, adjudication, or commitment to the State that issued the endorsement, and surrender the endorsement to the State, within 24 hours of the conviction, finding of not guilty by reason of insanity, adjudication, commitment, or renunciation.

(2) Submission of fingerprints. (i) From [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] to [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], an individual may submit fingerprints, in a form and manner specified by TSA, when a State revokes the individual's hazardous materials endorsement under paragraph (c)(1) of this section.

(ii) Beginning on [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], an individual must submit fingerprints, in a form and manner specified by TSA, when he or she applies to obtain, renew, or transfer a hazardous materials endorsement for a CDL, or when requested by TSA.

(iii) When submitting fingerprints under this section, the individual, or his or her employer, is responsible for the fee charged by the person or other entity collecting the fingerprints and generating the individual's criminal history.

(c) States. (1) From [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] to [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], each State must revoke an individual's hazardous materials endorsement if TSA informs the State that the individual does not meet the standards for security threat assessment in paragraph (d) of this section.

(2) No later than [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]:

(i) No State may issue, renew, or transfer a hazardous materials endorsement for a CDL unless the State receives a Notification of No Security Threat from TSA.

(ii) Each State must notify each individual holding a hazardous materials endorsement issued by that State that he or she will be subject to the security threat assessment described in this section as part of any application for renewal of the endorsement, at least 180 days prior to the expiration date of the endorsement. The notice must inform the individual that he or she may initiate the security threat assessment required by this section at any time after receiving the notice, but no later than 90 days before the expiration date of the endorsement.

(3) From [INSERT DATE 180 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER] to [INSERT DATE 360 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], while TSA is conducting a security threat assessment on an individual—

(i) If the individual holds a CDL with a hazardous materials endorsement, and is applying for renewal or transfer of the endorsement, the State that issued the endorsement may extend the expiration date of the individual's endorsement until the State receives a Final Notification of Threat Assessment or Notification of No Security Threat from TSA.

(ii) If the individual is applying for a hazardous materials endorsement for the first time, the State may not issue the endorsement until the State receives a Notification of No Security Threat from TSA.

(d) Standards for security threat assessment.

(1) TSA determines that an individual does not pose a security threat warranting denial of a hazardous materials endorsement for a CDL if:

(i) The individual meets the citizenship status requirements in § 1572.105;

(ii) The individual does not have a disqualifying criminal offense, as described in § 1572.103;

(iii) The individual has not been adjudicated as a mental defective or committed to a mental institution, as described in § 1572.109; and

(iv) TSA conducts the analyses described in § 1572.107 and determines that the individual does not pose a security threat.

(2) In conducting the security threat assessment requirements of this section, TSA uses one or more of the following:

(i) An individual's fingerprints.

(ii) An individual's name.

(iii) Other identifying information.

(3) When reviewing the individual's criminal history records, TSA will not issue a Notification of No Security Threat, and will alert the State(s) and the Federal Motor Carrier Safety Administration (FMCSA) if the records indicate a disqualifying criminal offense listed in the FMCSA's rules for holders of CDLs at 49 CFR 383.51, until the FMCSA or the State(s) informs TSA that the individual is not disqualified under that section.

(4) If TSA determines during the course of conducting a security threat assessment, that it is necessary to revoke a hazardous materials endorsement immediately, TSA will direct the State to revoke a hazardous materials endorsement immediately. The individual may appeal the revocation following surrender of the endorsement, pursuant to the procedures set forth in §1572.141(i).

(e) Application form.

(1) When an individual applies to a State to issue, renew, or transfer a hazardous materials endorsement for a CDL, the State must have the individual complete an application that includes the following:

(i) The disqualifying crimes identified in § 1572.103.

(ii) A statement that the individual signing the application:

(A) Was not convicted, or found not guilty by reason of insanity, of any disqualifying crime in any jurisdiction, civilian or military, during the 7 years before the date of the individual's application;

(B) Was not released from incarceration in any jurisdiction, civilian or military, for committing any disqualifying crime during the 5 years before the date of the individual's application;

(C) Is not wanted or under indictment in any jurisdiction, civilian or military, for a disqualifying crime;

(D) Has not been adjudicated as a mental defective or committed to a mental institution involuntarily;

(E) Is either a United States citizen who has not renounced his or her United States citizenship, or a lawful permanent resident of the United States;

(F) Has or has not served in the military, and if so, the branch in which he or she served, the date of discharge, and the type of discharge; and

(G) Has been informed that Federal regulations under 49 CFR 1572.5(b) impose a continuing obligation to disclose to the State within 24 hours if he or she is convicted, or found not guilty by reason of insanity, of any disqualifying crime, or adjudicated as a mental defective or committed to a mental institution, while he or she has a hazardous materials endorsement for a CDL.

(iii) A statement reading:

Privacy Act Notice: Authority: The authority for collecting this information is 49 U.S.C. 114, 40113, and 49 U.S.C. 5103a. Purpose: This information is needed to verify your identity and to conduct a security threat assessment to evaluate your suitability for a hazardous materials endorsement for a commercial drivers license. Your Social Security Number (SSN) or alien registration number will be used as your identification number in this process and to verify your identity. Furnishing this information, including your SSN or alien registration number, is voluntary; however, failure to provide it will prevent the

completion of your security threat assessment, without which you may not be granted a hazardous materials endorsement. Routine Uses: Routine uses of this information include disclosure to the FBI to retrieve your criminal history record; to TSA contractors or other agents who are providing services relating to the security threat assessments; to appropriate governmental agencies for licensing, law enforcement, or security purposes, or in the interests of national security; and to foreign and international governmental authorities in accordance with law and international agreement.

(iv) A statement reading:

The information I have provided on this application is true, complete, and correct to the best of my knowledge and belief and is provided in good faith. I understand that a knowing and willful false statement, or an omission of a material fact, on this application can be punished by fine or imprisonment or both (see section 1001 of Title 18 United States Code), and may be grounds for denial of a hazardous materials endorsement.

(v) Lines for the individual's –

(A) Printed name, including first, middle, and last, and any applicable suffix.

(B) Current residential address, and all other residential addresses for the previous seven years.

(C) Date of birth.

(D) Social security number, if the individual is a citizen of the United States, and date of naturalization, if the individual is a naturalized citizen of the United States.

(E) Gender.

(F) City, State, and country of birth.

(G) Citizenship.

(H) Alien registration number, if the individual is a lawful permanent resident of the United States.

(I) Signature and date of signature.

(2) Each individual must complete and sign the application form. The State must forward it to TSA in a form and manner acceptable to TSA.

(3) The State must inform the individual that a copy of the individual's criminal history record will be provided to the individual by TSA, if the individual makes a written request for the record.

(f) Determination of arrest status. When a criminal history records check on an individual applying for a hazardous endorsement for a CDL discloses an arrest for any disqualifying crime listed in § 1572.103 without indicating a disposition, TSA follows the procedures in § 1572.103.

(g) Notification.

(1) Notification of No Security Threat. If, after conducting the security threat assessment, TSA determines that an individual meets the standards described in paragraph (d) of this section, TSA serves a Notification of No Security Threat to the State in which the individual applied for the hazardous material endorsement.

(2) Initial Notification of Threat Assessment. If, after conducting the security threat assessment, TSA determines that an individual does not meet the standards described in paragraph (d) of this section, TSA serves an Initial Notification of Threat Assessment on the individual and the State in which the individual applied for the hazardous materials endorsement, in accordance with § 1572.141(b). The individual may appeal this determination under the procedures in § 1572.141.

(3) Final Notification of Threat Assessment. If, after completing the process in § 1572.141, TSA determines that an individual does not meet the standards described in paragraph (d) of this section, TSA serves a Final Notification of Threat Assessment on the individual and the State in which the individual applied for the hazardous materials endorsement, in accordance with § 1572.141(e). The individual may not appeal this determination, but may apply for a waiver.

(4) Waivers. If an individual does not meet the standards in paragraph (d) of this section, he or she may apply for a waiver under § 1572.143.

(5) State notification requirements. Within 15 days of the receipt of a Notification of No Security Threat, a Final Notification of Threat Assessment, or a grant of a waiver, the State must:

(i) Update the individual's permanent record to reflect:

(A) The results of the security threat assessment;

(B) The issuance or denial of a hazardous materials endorsement; and

(C) The hazardous materials endorsement expiration date.

(ii) Notify the Commercial Drivers License Information System operator of the results of the security threat assessment.

(iii) Revoke or deny the individual's hazardous materials endorsement, if TSA serves the State with a Final Notification of Threat Assessment.

(iv) Grant or renew the individual's hazardous materials endorsement, if TSA serves the State with a Notification of No Security Threat, or a written decision from TSA to grant a waiver, and the individual is otherwise qualified.

6. Add a new Subpart B to Part 1572 to read as follows:

Subpart B – Standards, Appeals, and Waivers for Security Threat Assessments

Sec.

§ 1572.101 Scope and definitions.

(a) This subpart applies to individuals who hold or are applying for a hazardous material endorsement for a CDL.

(b) For purposes of this subpart, the following terms have the following definitions.

Associate Administrator/Chief Operating Officer means the Associate Administrator who is also the Chief Operating Officer of TSA, or his or her designee.

Authorization means any credential or endorsement for which TSA conducts a security threat assessment under this part, including a hazardous materials endorsement for a CDL.

Date of service means—

(1) The date of personal delivery in the case of personal service;

(2) The mailing date shown on the certificate of service;

(3) The date shown on the postmark if there is no certificate of service;

(4) Another mailing date shown by other evidence if there is no certificate of service or postmark; or

(5) The date in an e-mail showing when it was sent.

Day means calendar day.

§ 1572.103 Disqualifying criminal offenses.

(a) An individual has a disqualifying criminal offense if the individual:

(1) Was convicted, or found not guilty by reason of insanity, of any of the disqualifying crimes listed in paragraph (b) of this section in any jurisdiction, civilian or military, during the 7 years before the date of the individual's application for the authorization, except as provided in paragraph (d) of this section;

(2) Was released from incarceration for committing any of the disqualifying crimes listed in paragraph (b) of this section in any jurisdiction, civilian or military, during the 5 years before the date of the individual's application for the authorization, except as provided in paragraph (d) of this section; or

(3) Is wanted or under indictment in any jurisdiction, civilian or military, for any of the disqualifying crimes listed in paragraph (b) of this section.

(b) The disqualifying crimes are felonies involving:

(1) Any crime listed in 18 U.S.C. Chapter 113B – Terrorism

(2) Murder.

(3) Assault with intent to murder.

(4) Espionage.

(5) Sedition.

(6) Kidnapping or hostage taking.

(7) Treason.

(8) Rape or aggravated sexual abuse.

(9) Unlawful possession, use, sale, distribution, or manufacture of an explosive, explosive device, firearm, or other weapon.

(10) Extortion.

(11) Robbery.

(12) Arson.

(13) Distribution of, intent to distribute, possession, or importation of a controlled substance.

(14) Dishonesty, fraud, or misrepresentation, including identity fraud.

(15) A crime involving a severe transportation security incident.

(16) Improper transportation of a hazardous material.

(17) Bribery.

(18) Smuggling.

(19) Immigration violations.

(20) Violations of the Racketeer Influenced and Corrupt Organizations Act; 18 U.S.C. 1961, et seq.

(21) Conspiracy or attempt to commit any of the crimes listed in paragraph (b) of this section.

(c) Determination of arrest status.

(1) When a criminal history records check on an individual discloses an arrest for any disqualifying crime listed in paragraph (b) of this section without indicating a disposition, TSA will notify the individual.

(2) The individual must provide TSA with written proof that the arrest did not result in a disqualifying criminal offense within 30 days after the service date of the notification in paragraph (c)(1) of this section. If TSA does not receive proof in that time, TSA may issue an Initial Notification of Threat Assessment in accordance with § 1572.141.

(d) The time periods specified in paragraphs (a)(1) and (a)(2) of this section do not apply to:

(1) The crimes listed in paragraphs (b)(1), (b)(4) - (b)(5), (b)(7), (b)(12), (b)(15), and (b)(16) of this section;

(2) The crime in paragraph (b)(9) of this section involving an explosive; and

(3) Conspiracy or attempt to commit the crimes listed in paragraphs (d)(1) and (d)(2) of this section.

§ 1572.105 Citizenship status.

(a) An individual applying for an authorization under this part must be either—

(1) A citizen of the United States who has not renounced his or her United States' citizenship; or

(2) A lawful permanent resident of the United States.

(b) To determine an individual's citizenship status, TSA checks relevant Federal databases, and may perform other checks, including verifying the validity of the individual's social security number or alien registration number.

§ 1572.107 Other analyses.

(a) TSA checks the following databases and conducts a security threat analysis before determining that an individual does not pose a security threat warranting denial of an authorization under this part:

(1) Interpol and other international databases;

(2) TSA watchlists; and

(3) Any other databases relevant to determining whether an individual poses a security threat or that confirm an individual's identity.

(b) An individual poses a security threat under this section when TSA determines or suspects him or her of being a threat—

(1) To national security;

(2) To transportation security; or

(3) Of terrorism.

§ 1572.109 Mental defects.

(a) An individual has a mental defect if he or she has been—

(1) Adjudicated as a mental defective; or

(2) Committed to a mental institution.

(b) An individual is adjudicated as a mental defective if—

(1) A court, board, commission, or other lawful authority has determined that the individual, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to him- or herself or others, or lacks the mental capacity to contract or manage his or her own affairs.

(2) This includes a finding of insanity by a court in a criminal case; and a finding of incompetency to stand trial or a finding of not guilty by reason of lack of mental responsibility by any court, or pursuant to articles 50a and 76b of the Uniform Code of Military Justice (10 U.S.C. 850a and 876b).

(c) An individual is committed to a mental institution if—

(1) He or she is formally committed to a mental institution by a court, board, commission, or other lawful authority, including involuntary commitment and commitment for mental defectiveness, mental illness, and drug use.

(2) This does not include a commitment to a mental institution for observation or voluntary admission to a mental institution.

§ 1572.111-1572.139 [Reserved]

§ 1572.141 Notification of threat assessment and appeal.

(a) Scope. This section applies to individuals who receive an Initial Notification of Threat Assessment stating that they do not meet the standards for a security threat assessment and who wish to appeal the notification.

(b) Initial Notification of Threat Assessment.

(1) If TSA determines that an individual poses a security threat warranting denial of the authorization, TSA serves upon the individual an Initial Notification of Threat Assessment.

(2) The Initial Notification includes—

(i) A statement that TSA has determined that the individual poses a security threat warranting denial of the authorization;

(ii) The basis for the determination; and

(iii) Information about the correction of records and appeals processes.

(c) Grounds for Appeal. (1) An individual may appeal an Initial Notification only if the individual is asserting that he or she meets the standards of the authorization for which he or she is applying.

(2) If the Initial Notification was based on a conviction for a disqualifying crime listed in § 1572.103, the individual may present evidence that the underlying criminal record is incorrect, or that the conviction was pardoned, expunged, or overturned on appeal. An executive pardon, expungement, or overturned conviction may nullify a disqualifying conviction if the pardon, expungement, or overturned conviction does not impose any restrictions on the individual. A correction of the record(s) may nullify the disqualifying conviction.

(d) Appeal. An individual may initiate an appeal of an Initial Notification by submitting a written request for materials or a written reply to TSA. If the individual does not initiate an appeal within the time periods specified in this paragraph, TSA serves a Final Notification of Threat Assessment under paragraph (e) of this section.

(1) Request for materials. Not later than 15 days after the date of service of the Initial Notification, the individual may serve upon TSA a written request for copies of the materials upon which the Initial Notification was based.

(2) TSA response. Not later than 30 days after receiving the individual's request for materials, TSA serves copies upon the individual of the releasable materials upon which the Initial Notification was based. TSA will not include any classified information or other protected information described in paragraph (f) of this section.

(3) Correction of records. If the Initial Notification of Threat Assessment was based on an FBI criminal history record that the individual believes is erroneous, the individual may correct the record, as follows:

(i) The individual may contact the local jurisdiction responsible for the information and the FBI or other agency to complete or correct the information contained in his or her record.

(ii) The individual seeking to correct his or her record must provide TSA with the revised FBI criminal history record, or a certified true copy of the information from the appropriate court, before TSA may determine that the individual meets the standards for the security threat assessment.

(4) Reply.

(i) The individual may serve upon TSA a written reply to the Initial Notification not later than 15 days after the date of service of the Initial Notification, or 15 days after the date of service of TSA's response to the individual's request for materials under paragraph (d)(2) of this section, if the individual served such a request.

(ii) In an individual's reply, TSA will consider only material that is relevant to whether the individual meets the standards for the security threat assessment in § 1572.5(d).

(5) Final determination. Not later than 30 days after TSA receives the individual's reply, TSA serves a Final Notification of Threat Assessment or a Withdrawal of the Initial Notification in accordance with paragraph (e) of this section.

(e) Final Notification of Threat Assessment.

(1) Review. The Associate Administrator/Chief Operating Officer reviews the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to the agency before making a final decision.

(2) Issuance. If the Associate Administrator/Chief Operating Officer determines that the individual poses a security threat, the Associate Administrator/Chief Operating Officer serves upon the individual, and, in the case of a security threat assessment under § 1572.5, the State in which the individual applied for the authorization, a Final Notification of Threat Assessment.

(i) The Final Notification to the individual includes a statement that the Associate Administrator/Chief Operating Officer has reviewed the Initial Notification, the individual's reply, if any, and any other materials or information available to him or her, and has determined that the individual poses a security threat warranting denial of the authorization.

(ii) The Final Notification to the State contains a statement that TSA has determined that the individual poses a security threat warranting denial of the authorization.

(3) Withdrawal of Initial Notification. If the Associate Administrator/Chief Operating Officer does not conclude that the individual poses a security threat warranting denial of the authorization, TSA serves upon the individual a Withdrawal of the Initial Notification. In the case of a security threat assessment under § 1572.5 of this part, TSA will also serve a Notification of No Security Threat to the State in which the individual applied for the authorization.

(f) Nondisclosure of certain information. In connection with the procedures under this section, TSA does not disclose to the individual classified information, as defined in section 1.1(d) of Executive Order 12968, and reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law.

(g) Extension of time. TSA may grant an individual an extension of time of the limits set forth in this section for good cause shown. An individual's request for an extension of time must be in writing and be received by TSA at least 2 days before the due date to be extended. TSA may grant itself an extension of time for good cause.

(h) Judicial review. For purposes of judicial review, the Final Notification of Threat Assessment constitutes a final TSA order in accordance with 49 U.S.C. 46110.

(i) Appeal of Immediate Revocation.

(1) If TSA directs a State to revoke the hazardous materials endorsement immediately pursuant to § 1572.5(d)(4), the individual may—

(i) Within 10 days of revocation, submit a written request to TSA to appeal the decision on which the revocation was based.

(ii) The written request must include the basis on which the appeal should be granted, including a correction of records, and all supporting documentation.

(2) Within 10 days of receipt of the written request, TSA will serve on the individual and the State in which the individual applied for a hazardous materials endorsement, its final decision and a statement explaining the basis for the decision.

§ 1572.143 Waivers.

(a) Scope. (1) Except as provided in paragraph (a)(2), this section applies to individuals who do not meet the standards for a security threat assessment and who are requesting a waiver from those standards.

(2) Individuals who do not meet the standards for a security threat assessment under § 1572.105 or § 1572.107 are not eligible for a waiver.

(b) Waivers. (1) An individual who does not meet the standards for a security threat assessment in this part may send a written request to TSA for a waiver at any time but not later than 15 days from the date of service of the Final Notification of Threat Assessment.

(2) In determining whether to grant a waiver, TSA will consider the following factors, if the disqualification was based on a disqualifying criminal offense:

(i) The circumstances of any disqualifying act or offense;

(ii) Restitution made by the individual;

(iii) Any Federal or State mitigation remedies; and

(iv) Other factors that indicate the individual does not pose a security threat warranting denial of the authorization for which he or she is applying.

(c) Grant or denial of waivers. TSA will send a written decision to grant or deny a waiver under this section to the individual and, if applicable, the State in which the individual applied for the authorization, within 30 days of the service date of the individual's application for a waiver, or such longer period as TSA may determine for good cause.

(d) Extension of time. TSA may grant an individual an extension of time of the limits set forth in this section for good cause shown. An individual's request for an extension of time must be in writing and be received by TSA at least 2 days before the due date to be extended. TSA may grant itself an extension of time for good cause.

Issued in Arlington, VA on April 25, 2003.

/S/
J.M. Loy, ADM
Administrator